THE ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE

DEPARTMENT OF JUSTICE
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ADMINISTRATION OF THE FAIR LABOR STANDARDS ACT OF 1938

WAGE AND HOUR DIVISION

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B.

EXEMPTIONS

In general: powers. The FLSA provides that certain types of employees and certain types of work shall be exempted either entirely from the operation of the Act or from the maximum hours or minimum wage requirements. Many of these exemptions are self-executing: Section 13 exempts altogether employees engaged in any retail or service establishment "the greater part of whose selling or servicing is in intrastate commerce"; seamen; employees of a carrier by air subject to title II of the Railway Labor Act; any employer engaged in agriculture; and several other groups of employees engaged in particular kinds of work. Other exemptions are provided, however, which require further administrative action. One type requires only administrative definition of the statutory term, and is described in a succeeding section of this monograph (infra, p. 143 ff.). A second type of exemptions, on the other hand, requires more than mere definition and involves individual scrutiny and dispensation which acquires many of the characteristics of adjudication. This type of exemptions includes those permitting subminimum wages to be paid to (1) learners; (2) apprentices; (3) messengers "employed exclusively in delivering letters and messages"; and (4) individuals "whose earning capacity is impaired by age or physical or mental deficiency or injury". Such exemptions shall be made by the Administrator "by regulations or orders", but only "to the extent necessary in order to prevent curtailment of opportunities for employment" (Section 14). Further, Section

7(b)(3) exempts from the maximum hour requirements for a period or periods of not more than fourteen work-weeks in the aggregate in any calendar year any industry "found by the Administrator to be of a seasonal nature".

Hearings Branch; procedure in general. The Administrator has vested initial power to consider questions involving exemptions in a separate unit known as the Hearings Branch. This Branch is composed of approximately 50 employees, including clerical help and a small field staff which occasionally engages in investigation prior to ultimate determination. Only about 12 professional employees are included in this staff; most of these 12 are economists. The Director of the Branch is an attorney; the two Assistant Directors are persons with varied economic or social background. There is also an industrial engineer, expert in production techniques, and two occupational experts. In addition, attorneys and economists from the General Counsel's staff and the Research and Statistics Branch, respectively, are assigned to the Hearings Branch to assist in the preparation of relevant data and to sit with the hearing officers at the hearings.

The Hearings Branch is divided into three units: (1) that charged with responsibility for acting upon applications relating to seasonal industries and agricultural exemptions; (2) that acting upon applications to employ learners and apprentices and (3) that which handles applications for the employment of handicapped workers. It is planned presently to decentralize

the procedure relating to handicapped workers; applications for this type of exemption will shortly be passed on at the regional offices in the area in which the applicants are located.

In general, it may be remarked that the exemption procedure is notable for its flexibility. In contrast to the more orthodox techniques utilized in respect of wage orders, the exemption procedures have adopted some novel devices to obtain efficient determination and to fit the varying problems raised by the different kinds of exemptions. Comparative "non-legalness" is a characteristic of exemption procedure. At the same time, however, the exemptions procedure has not yet been entirely crystallized, so that it occasionally defies ready comprehension or general description.

The general pattern of individual exemption cases follows the customary licensing procedure: (1) application; (2) examination; (3) hearing (where necessary); and (4) decision. To these four steps, as described more fully below, are added two novel procedures. The first is the general "industry" hearing, which resembles in its effect hearings leading to the issuance of general rules; and the second is the method provided for appeal and review on appeal.

At the close of the calendar year 1939, three applications for messenger exemptions had been received. A joint hearing was held on two of these, and the application was denied both by the hearing officer and, subsequently, by the Administrator. The

third application was withdrawn. Since the applicants represented the major companies who would possibly have qualified for this exemption, this field is now chiefly of historical interest.

Since the great bulk of applications for seasonal exemptions has been disposed of informally through denial, the figures on the workload in this respect are unavailable. As of December 15, 1939, six such exemptions had been granted without hearing; hearings were held on eight applications which resulted in five denials by the hearing officer, and the granting in part of another. The remaining cases in which hearing was held were pending decision at the close of the year. One denial had been reviewed and modified by the Administrator. In the first two months of 1940, eight or ten additional seasonal determinations have been made.

As of December 15, 1939, 25 applications for the employment of apprentices had been received, of which 11 had been granted. At the same time, 4,800 applications for the employment of handicapped workers had been made, and 2,385 granted.[71] Because it was felt that subminimum wages were not necessary to "prevent curtailment of opportunities for employment" of learners, very few of the

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[71] A general regulation dealing with handicapped workers granted a blanket exemption without further application or administrative action to handicapped workers who are provided occupational rehabilitating activity of an educational or therapeutic nature in charitable organizations; it was issued because the Administrator would not be able to act upon the many applications promptly enough, and because he was desirous of not endangering these projects by imposing too high a minimum. This blanket partial wage exemption applied until March 1, 1940. Shortly before March 1, a new regulation was issued and applications for the employment of such special handicapped workers are now required to be filed by individual establishments.

many applications for learners' certificates were granted while the minimum was still 25 cents an hour. Between July 17 and December 15, 1939, however, 1,054 applications were acted upon and 872 were granted; 182 were denied. Approximately 350 were pending determination. In addition ten hearings on an "industry" basis on applications for learners have been held.

Initiation of action: applications. Official action leading to the issuance of special certificates permitting employment of messengers, apprentices, learners, and handicapped workers at subminimal rates, and of persons working in seasonal industries at more than the maximum hours, is invoked in all cases by the filing of applications. Messenger applications may be filed by an employer, an employee, or a group of employers or employees. Apprentice applications, as well as those involving handicapped workers, must be signed by both the employer and employee affected. Learner applications may be made by "any employer . . . whenever employment of learners at /a/ lower rate is believed necessary to prevent curtailment of employment opportunities in /the/ plant." An application for a seasonal exemption may be filed by "any industry, or employer, or employer group therein"; if an individual employer files, he must be representative of the industry of which he is a member.

Varying conditions are imposed upon the filing of the several applications. Apprentice applications must be accompanied by the apprentice agreement; messenger, seasonal, learner, and

handicapped worker applications must set forth certain specific information which would qualify the applicant to the exemption. The general regulations governing apprentice, handicapped worker, and learner exemptions respectively each provide that the application must be made on forms furnished by the Division. The applications for these three exemptions must also be under oath; they are not, however, required to be notarized. It is asserted that this requirement is imposed because the applications are made by individuals, and in most cases constitute the entire record upon which disposition of the case is based. A handicapped worker's certificate issued on the basis of an application which contains any false material statement or information is null and void, subject to cancellation ab initio, and rendering the employer liable for the full difference between the minimum wage and the subminimum permitted by the certificate for the entire period. Similarly, a special learner's certificate "shall be null and void if the applicant shall have set forth any fact or facts in his application which he knew or had reasonable cause to believe was false."

Types of further action which may be taken. To weed out the simpler cases and to permit of concentration upon only the more difficult, complex, or important applications, the Division has devised an intricate yet flexible system of possible actions which may be taken. Three possibilities are provided for in relation to seasonal applications: Upon consideration of the facts and reasons stated in an application, the Branch may (a) forthwith deny the

application on the ground that it fails to allege facts entitling the industry to an exemption; or (b) forthwith set the application for hearing; or (c) (after consideration of the application and independent investigation) find and announce that a prima facie case for exemption has been shown, and permit 15 days for objections. Similar possibilities are present in respect of learner applications.[72] In both types of exemptions, individual applications may be combined and a single hearing may be held thereon. Preferential treatment is accorded to representative applications and, in fact, in relation to learner exemptions, for a considerable period no individual applications would be acted upon until there had been a general public hearing on the question of learning occupations in the industry, or branch thereof, as a whole. In addition, although action will be taken on individual applications for seasonal exemption, such action will result in an industry finding.

Different preliminary procedure is provided for the consideration of other types of applications. No provision is made

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[72] The Branch may, upon the basis of the application, immediately issue a special certificate of exemption. If objections are received within 15 days, and the subsequent hearing thereon discloses that the certificate had been erroneously issued, the certificate will be cancelled and all persons employed pursuant to the terms of the certificate shall be reimbursed "in an amount equal to the difference between the applicable statutory minimum wage and the lesser wage paid such persons." This rather cumbersome arrangement is utilized since certificates are effective only from the date of issuance; therefore, to withhold a certificate may be expensive to the employer and will place a premium upon objections which, no matter how ill-founded, would delay issuance and mean so many extra dollars in the pockets of the employees.

for initial hearing in apprentice and handicapped worker exemption cases. The certificate, instead, is issued or denied upon the basis of the application and accompanying material or, in handicapped workers, upon independent investigation, with possibility of review by the Administrator as described below. Extended procedure in these two types of cases is said to be unnecessary; in neither are there difficult questions of evidence, and the issues are clear-cut. The standards for identifying apprentices are well-defined through apprentice agreements, through the activities of the State and Federal Committees on Apprenticeship, and through the work of the Division of Labor Standards of the Department of Labor. In fact, the apprentice certificate is automatic if the application is correctly filled out and the apprentice agreement has been approved by an accepted agency. Similarly, the existence of infirmities which qualify an employee for the handicapped exemption is readily ascertainable through doctor's certificates usually required to be included. This case of determination contrasts sharply with the difficulty of establishing the absence of skill which would qualify a learner. More fundamental, however, is the fact that, in contrast to the learners exemptions, the Division does not emphasize the statutory issue of "curtailment of opportunities of employment"; it is enough, in respect of these two classes, to show the fact of apprenticeship or handicap, and failure to grant an exemption certificate seems to be presumed without more to involve curtailment of opportunities for employment of these types of individuals. On the other hand, this issue

is a major one as to learners; not only must the applicant show that a learning period is necessary, but that no skilled help is available and that a reasonable employer in the position of the employer would not hire any workers for the jobs if he were not permitted to hire learners at a subminimal rate.

Conversely, the messenger exemption procedure permits of less flexibility in the opposite direction: The messenger regulation simply provides that upon application "a hearing will be held" (Section 523.5). The departure is explained on pragmatic grounds: The procedure was devised with the only two possible applicants in mind. Both these companies had engaged in considerable agitation before the Act became effective, and it was obvious that hearings would shortly have to be held. Accordingly, the drafters of the regulation did not bother with more elaborate possibilities which would never be invoked. In fact, it is asserted that despite the wording of the regulation, hearings are discretionary, but the problem simply has never been raised.

Machinery for determination concerning further action upon applications. Applications, as already described, are initially routed to the Hearings Branch, where in turn, they are assigned to the appropriate senior examiner for the learner unit, for the seasonal and agricultural unit, or the messenger, apprentice and handicapped worker unit, depending, of course, upon the exemption sought to be obtained. The senior examiner examines the application briefly and, in turn, assigns it to one of his subordinate examiners. Such assignment depends upon the apparent

difficulty of the case; applications upon whose face entitlement is shown and no serious problems seem to be raised, are assigned to the junior examiners, while applications which appear to be complex are handed to more experienced examiners.

The subordinate to whom the application is assigned proceeds, after analysis of the application, to seek "check-up information", particularly in cases involving learners' applications. Such information is gained from State and Federal employment offices and from unions which have knowledge of conditions in the community. Where the question concerns learners, these groups are consulted as to the availability of skilled help in the area in which the applicant's plant is located. In addition, the Cooperation and Inspection Branch is consulted concerning the employer's compliance record, not because failure to comply bars entitlement, but only as an indication of the applicant's bona fides and general credibility.

Where the issues are complex or doubts arise, further information is ordinarily developed by correspondence, both with the employer-applicant and others. Where possible within staff limitations, actual field investigation is utilized; unfortunately, this highly effective method cannot be used as often as is desirable, but will, it may be expected, be more freely utilized with the completion of the organization of regional offices. At present, investigation is reserved for two types of situations: (1) Where complaint is made that the terms of a certificate already issued are being violated; and (2) where the statements of the employer

on the one hand or the union or the employment service, on the other, are in complete disagreement concerning, for example, the availability of skilled help.[73]

In addition to investigation and correspondence, the facts are not infrequently supplemented by informal conferences between staff members and the applicant. Further, information at this stage may be volunteered by other parties affected. Since as is noted below, this "preliminary" development in the vast majority of cases results in the ultimate disposition of the application, the Division has wisely provided special mechanics for giving notice of the filing of the application so that employees may be apprised that action is being considered. In learner applications (apprentice and handicapped applications, as already described, must be filed jointly, so that the employees affected are already aware of the proceedings), the applicant is required immediately to

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[73] For no apparent reason, the regulation governing issuance of handicapped workers' certificates expressly provides for further investigation: "To determine whether the facts justify the issuance of a Special Certificate for a handicapped worker, the Administrator or his authorized representative may in any case order an investigation and require additional data or facts or may require the worker to take a medical examination, or may require that certain facts be certified by designated officers of the state or federal government". The recently amended seasonal regulation also expressly permits determination to be made upon the basis of investigation. A parallel provision might be desirable for all exemptions, lest its absence be interpreted to require that determination as to the other exemptions must be limited to a consideration of the allegations of the application only.

post notices of the filing on a form supplied by the Division. Such notice must be posted "in a conspicuous place in each department of /the applicant's/ plant where he proposes to employ learners at wages lower than the minimum . . . Such notice must contain all the information required therein and shall remain posted until such time as the application shall have been acted upon by the Administrator". It is also to be noted that, although the investigation (either by correspondence or otherwise) is ex parte, the determination of the type of action to be taken is not made without keeping the applicant apprised of the information which has been developed. Thus, for example, if, upon investigation of an application for learners, it appears that skilled help is available in the area, the applicant is so notified, although the source of such information may sometimes be withheld (e.g., if the Division has obtained the employment figures from the local employment service, the fact that the latter supplied the figures may not be disclosed to the applicant in order to save it embarrassment and to avoid the danger of creating friction between the employer and the service). In addition, if the investigation indicates the availability of skilled help, the applicant is notified not only of that fact, but where such help may be obtained. The notifying letter in such a situation may state that if the Division does not hear from the applicant within two weeks, it will be assumed that his needs have been fulfilled. By this method, and by informal conferences, a large number of applications are disposed

of without formal action of any kind; rather, the applicant simply falls to press the application further.[74]

Although the regulations governing the procedures relating to applications for the several exemptions (except seasonal and handicapped workers) in terms require the initial determination as to further action to be made upon the allegations of the application only, in fact, as indicated by the prior discussion, fortunately no such limitation obtains; indeed, amendment of the regulations is being considered expressly to permit action to be taken on the basis of the application and all other relevant material. It should, in addition, be noted that the Hearings Branch in determining whether to deny or hold a hearing forthwith, or announce a prima facie entitlement, does not in practice limit itself to the material gathered in the particular case, but quite properly utilizes its "official knowledge". For example, if the allegations of the application for a learner exemption are insufficient, the application will not be forthwith denied if the Branch knows, from experience in other cases, that skilled help in the area is unavailable or that the operations require a learning period. Similarly, if A's application to employ learners in the town of Y is denied after investigation, on the ground of the availability

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74 A similar situation obtains in respect of seasonal applications. "In addition to the formal procedures set forth in the regulations, it should be observed that the great bulk of informal applications received . . . have been handled by informal notification of the inapplicability of the seasonal finding to the industry in question. This procedure has saved the Administrator a great deal of time and it has also afforded an opportunity to inform interested parties concerning the significance of the seasonal provision in the Act more promptly and in a more adequate manner than would

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of skilled help, B's application filed shortly thereafter for his plant engaged in the same operations in the same town will also be denied without further investigation. B will be notified first, however, of the results of the prior investigation and will be afforded an opportunity to show that conditions have changed or had been erroneously reported.[75]

Industry hearings on learner applications. A special procedure devised by the Division is the industry hearing on learner applications. Because of the large number of applications filed which presented interrelated problems, until May 1939 individual applications were not acted upon unless and until there had been a general industry hearing; the requirement has since been relaxed, and it is now provided by regulation that

> "The Administrator or his authorized representative may, if he deems it advisable, prior to granting any application, hold a hearing for an industry or branch thereof to determine the occupation or occupations which require a learning period, to determine the factors which may have a bearing upon curtailment of opportunities for employment within the industry and

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have been practical under a system of formal denials. In the vast majority of instances applicants have not pressed their applications after the letters of explanation have been received." Annual Report (1939) 164-165.

75 Denial on the basis of the application and other material does not preclude a renewal of the application. The regulations governing learner procedure provides that "any application which fails to present the information required by such form will not be considered . . . but will be returned to the applicant with a notation of deficiencies and without prejudice against submission of a new application." The handicapped worker regulation is broader, stating that "Upon the submission of additional material facts an authorized representative of the Administrator may reconsider an application and revise his former action." In fact, this is the practice in respect of all applications. See infra, pp. 129-130.

to determine under what limitations as to wages, time, number, proportion and length of service certificates may be issued to employers in any such occupations or occupations in the industry."

In all, there have been ten such industry hearings at which the issues concerning the skill required, the general availability of skilled help, the nature of the various occupations in the industry, and the like, were explored. These industry hearings do not result in the granting or denial of the individual applications of persons participating in the hearing, but only in a general regulation, applicable to the industry involved, setting out the occupations in which certificates may be granted, the period for and the conditions under which they will be granted, the subminimum wage permitted, and related rules.

Although the industry hearing is undeniably a useful device which diminishes the necessity of repeated processes of proof and determinations of recurring common problems, the precise effect has not been fully crystallized as yet and some confusion has resulted. The complaint has been made that the general rules emanating from industry hearings are not always clear, and sometimes have succeeded as much in confusing the issues in individual applications as in simplifying them. It is not now entirely plain just what issues are left open on individual applications and how much repetition of proof is necessary. Not the least important reason for the confusion is the ambiguity of the Act; it is not apparent whether "curtailment of opportunities for employment" refers to a particular plant or to an entire industry; the Division seems to have interpreted it to mean both. In general it may be safely stated that issues concerning "turnover" - that is, the rate at which experienced workers must be replaced in a given industry - are ordinarily

settled by the industry hearing; each individual applicant is left thereafter, however, to prove issues involving "expansion" - that is, a non-normal need for new workers occasioned by the establishment of a new plant or enlargement of an old one. In addition, it seems that as to non-variable factors - such as the skill involved in a particular occupation - the finding based on an industry hearing results in precluding an individual applicant from subsequently going behind the finding. The industry hearing, as described more fully below, is a public one, for which public notice has been given and which has been held frequently on representative applications (usually those of trade associations). Accordingly, the Division properly holds that all persons in the same branch of the industry are bound by the findings. On the other hand, it is stated that a finding, based on an industry hearing, that in general skilled help is available so that there is no need for learners, does not "absolutely" preclude an individual from showing that in his area, such help is unavailable. At informal conferences, an applicant who so claims will be permitted to show that his is a new or different situation; in addition, as already indicated, whether or not there have been industry findings, he is always free to show a need for learners because of expansion of an old plant or establishment of a new one. One official, however, has estimated that in cases where an industry hearing has led to a finding that no learners were necessary, subsequent individual applications have been granted only in one or two instances. Even these, it is asserted, were "more error than intention."

Further action upon applications: objections. The complete and flexible procedures for initial determination upon the basis of the

allegations of the applications and other material have made possible final disposition of the vast majority of applications at this stage. All the applications both for handicapped workers and for apprentices have been entirely disposed of by the methods described above. As already observed, hearing on the two applications for the messenger exemption was forthwith set without the procedures discussed. But in respect of applications for learners and seasonal exemptions, still another interesting technique has been devised effectively to dispose of the issues without a hearing except where the issues obviously require it (in which case, a hearing will be scheduled without delay) or the parties affected request it.

As has been pointed out, both the seasonal and learner regulations provide as one of the three possible courses of action to be taken upon an application that a preliminary determination of a prima facie case for the granting of an exemption may be published. Thereafter, 15 days are allowed for any interested person to object to the granting of the exemption. The regulations provide that if objection and request for a hearing are received within the proper period, hearing will be held; otherwise, in the case of the seasonal exemption, a finding will be made upon the prima facie determination, or, in the case of learners, the certificate previously issued will be affirmed and remain in effect.

By this device, no exemption in these two groups can be irrevocably granted until those adversely affected have had opportunity to protest. The notice of the prima facie determination is disseminated as widely as possible, is published in the Federal Register, mailed to the international or other parent union which may be affected or

interested and sent to persons on the general mailing list.[76] The regulation governing seasonal exemptions permits protests by "any person interested, including but not limited to employees, employee groups, and employee labor organizations within the industry claimed to be exempt." With the exception that the final clause ("within the industry") is omitted, the learner regulation is identical. The requirement of interest is liberally interpreted; not only competitors, but labor organizations which have no members in the plant affected, are entitled to protest.[77]

The learner regulation expressly calls for "adequate and detailed grounds" for objections, while the seasonal regulation omits this requirement and seems to make the holding of hearings automatic upon the request of the protestant. In fact, in both cases objections

76. Announcement was formerly also made by general press release, but, except in cases involving the seasonal issue, this was abandoned because the newspapers displayed great disinterest. One union spokesman complains that the method of sending notice to the parent union is unsatisfactory since "about five pounds of government notices" come to his desk daily and as a result many exemptions "slip through by default". Division officials justifiably feel that they cannot now undertake the task of discovering if any local unions may be present and interested; this responsibility must be shouldered by the parent organization. Of course, considerable difficulty is avoided in learner cases through the requirement that the employer post notices of his application (supra, pp. 110-111).

77. Some employers complain that this liberality has made the protest procedure subject to abuse by permitting the union and a unionized employer to agree that the latter's application will go through without objection, while the application of the non-union employer whose situation is otherwise identical, will be protested. But an alternative practice might be worse. The Division must of necessity depend in part upon the action of outside parties; to abandon the protest procedure and hold hearings or investigations in all cases would place an intolerable burden on the Division, while to permit only those unions with members in the plant to object would place a premium on non-unionization, deprive the Division of information which might be useful, and prevent a group which has a legitimate interest in the preservation of a wage structure from taking effective action to do so.

must be substantial, and in neither will hearing be held without further action by the Hearings Branch. Conferences and correspondence with both the protestant and the applicant may follow and field investigation may be utilized. The applicant may, in the course of this further action, be informed of the identity of the protestant except where the latter is an individual employed in the applicant's plant. Partly through these further steps, partly because the Branch proceeds cautiously on protests, and partly because protests in respect to learners' certificates have sometimes been based on misunderstanding of the industry hearing findings, all but four of the 30 protests as to learners have been withdrawn. Similarly, in only two of the eight cases in which there was a prima facie determination of seasonality did hearings result from protests. Each of the four learner hearings, and, so far as can be ascertained, both of the seasonal hearings, held upon objections and protests resulted in ultimate denial by the Hearings Branch.

Hearings: in general. As already stated, there have been about ten hearings on learners' exemptions; four hearings on objections to the issuance of learners certificates; two hearings on objections to a prima facie determination of seasonality; and one hearing on a joint application for messenger exemption. No hearings have been deemed necessary in respect of applications for handicapped workers or apprentices and no provision is made for a hearing prior to initial determination by the Branch. In addition eight applications for seasonal exemption have been immediately set down for hearing without preliminary determination.

Perhaps the chief general characteristic of exemption hearings is their contrast to wage order hearings in respect of the comparative

informality which obtains at the former. Although, of course, the general atmosphere often depends on the parties involved, the contentiousness and adversary characteristics which mark wage order hearings are ordinarily absent in exemption hearings. It may fairly be stated that, as a rule (the hearing on the learners exemption for the millinery industry was an exception), exemption hearings have more nearly resembled legislative inquiries than judicial trials.

Notice of hearing. In each of the regulations governing the three exemptions upon which hearings may be initially held by the Hearings Branch, provision is made for the publication in the Federal Register and by general press release of a notice of the "time, place, and scope of a hearing" upon any application. In addition, the regulation governing learners' applications requires that "The applicant shall in all cases be given notice by registered mail of any hearings to be held for the purpose of determining whether any special certificate shall be cancelled", while, as already described, employees in the applicant's plant have already been apprised of the application through the applicant's posting of notices. In addition, where any hearing is held upon objections to a prima facie determination, notice thereof is sent by registered mail to the applicant and the protestant.[78]

78. In one case, a hearing was reopened because one of the interested parties failed to receive actual notice. This was an industry hearing on the application of a trade association for the employment of learners in the textile industry; notice was published in the usual manner, and the Hearings Branch found that certain exemptions were permissible. Subsequently, it appeared that another trade association representing a branch of the industry had previously announced opposition to the granting of learners' certificates in its branch. Stating that "Whereas it appears that [such association] represents a substantial part of the . . . industry and . . . did not have actual notice of the said hearing . . . and did not appear or present evidence . . .; whereas, equity and fairness would appear to require that the said hearing be reopened to permit the introduction of further evidence relevant . . . to the . . . branch . . ." the Division announced that the hearing would be reopened.

The notice includes not only the time, place, and date of the hearing, as required by the applicable regulations, but of the subject-matter to be considered. Thus for example, notice of hearing upon an application for a learner or messenger exemption announces that "testimony will be taken for the purpose of determining whether it is necessary, in order to prevent curtailment of opportunities for employment, to provide for the employment of [learners or messengers] . . . and if such necessity is found to exist, to determine the wages and limitations as to time, number, proportion and length of service." In addition, if the hearing is for an industry the notice includes the definition of such industry. The notice for seasonal exemption hearings sets out the filing of the application and other procedure, and announces that the purpose of the hearing is "to take testimony on the question whether or not the [named] industry as defined herein or any branch thereof is a seasonal industry" within the meaning of the Act.[79] Where the hearing results from protests, it is asserted that the applicant is informed of the grounds of the protest; it appears, however, that occasionally the grounds are not included and the applicant must come to the hearing unaware of the exact issues. When learners' exemptions are concerned, there may be several issues involving considerable preparation of technical or factual data; under these circumstances, care should be taken to insist upon specific objections and notice thereof to the applicant.

79. It is to be noted that the issues involved in learner exemptions, and a definition of seasonality, are included in the regulations governing these subjects, so that interested persons have more upon which to rely than the mere general notice. In addition, especially prior to industry hearings on learners, informal office conferences may take place between Division staff members and various interested parties, at which the issues are clarified and defined.

Time and place of hearings. Each of the regulations governing procedure for exemption provides that notice shall be given "at least 5 days before the date" of the hearing. In fact, at least ten and usually fifteen days are allowed; in the notice of hearing on an application for messenger exemptions, however, it was announced that upon the request of the parties, and since it appeared that no prejudice would be caused thereby, hearing was scheduled for six days after notice.

With a single exception, all hearings on individual applications for learners and most other exemption hearings have been held in Washington, D. C. The messenger hearing was held in New York City; the hearing upon the application of the pecan industry for learners was held in San Antonio, Texas; the seasonal application of the California unshelled walnut industry was held in San Francisco. Some hardship, of course, is imposed upon an individual applicant by requiring him to come to Washington, especially since the amount of savings involved in obtaining a learner's exemption is comparatively small. Further, of course, availability of skilled help, or weather conditions and the like, are local questions which are most easily susceptible of proof through witnesses in the particular area. But more frequent field hearings must necessarily remain an ideal until the Division is further organized, its policies more crystallized, its funds increased, and some degree of decentralization is achieved.

Participants in the hearing; the presiding officer. In exemption notices, it is customary to provide that

> "Opportunity will be afforded to interested parties to present evidence relevant to the . . . inquiry. All persons or associations desiring to avail themselves of this opportunity should, if possible, notify the Administrator in advance."

The notice in some hearings is more specific, stating that "all persons interested, including employees, employee groups, employee labor organizations, employers, employer groups and trade associations, within the industry affected, and designated subordinates of the Administrator, will be afforded an opportunity to present evidence and be heard." As in the case of wage order hearings, the word "interested" is liberally defined; any person who appears is deemed sufficiently interested to participate.

In contrast to the wage order proceedings, neither the Hearings Branch nor other Division groups actively participate as parties, although as indicated by the notice quoted in the preceding paragraph, designated subordinates from the Research and Statistics Branch may appear as witnesses to present a general picture of conditions involved. Nor is the Division represented by counsel; rather its only representative is the presiding officer, assisted by one or more legal and economic assistants who sit with him. This presiding officer, formally designated by the Administrator in the notice of hearing, is ordinarily the Director of the Hearings Branch, or one of his two chief assistants. The economists and attorneys who sit with the presiding officer are assigned, respectively, by the Research and Statistics Branch and the General Counsel's office. In the hearing upon the applications

for a messenger exemption an outsider, Dr. William Leiserson, then chairman of the National Mediation Board, presided.[80]

The function of the presiding officer. In almost every respect, the function of the presiding officer in exemption cases differs from that in wage order hearings. At this stage of the proceedings, he is virtually independent and, rather than acting as a mere conduit, he has the full responsibility for the conduct of the case and the shaping of the record. There is no attempt to invoke any tabula rasa or insulation concepts; he is free to confer with anyone concerning the issues, and in addition he and his assistants prior to the hearing make an effort to study all available material in order to inform themselves on the questions which will arise.

Similarly, at the hearing, the presiding officer takes the major role in shaping the record. He examines the witnesses at considerable length before other parties may cross-examine, and, in fact, in earlier hearings, he was the only person who could examine witnesses at all. In addition, the assistants who sit with him may and sometimes do ask questions; in general, however, their role is rather passive and their precise function or utility is not entirely clear.

Although it is submitted that the nature of these proceedings, which are simply inquiries to obtain a picture of a

80. In a second hearing on a reapplication for a messenger exemption, the Division's General Counsel was designated to preside. The hearing, however, was subsequently cancelled upon the withdrawal of the application.

particular industry or plant, fully justify this utilization of the presiding officer and the omission of other agency counsel, a certain tendency to assume an over-active role has sometimes been apparent. At times, the presiding officer's questioning tends to be rather argumentative; at other times, he seems to be assuming the burden of opposing the exemption, leading one applicant at a hearing which had progressed less than an hour to comment that "I guess we won't get it." The presiding officer is, however, justified in insisting that applicants for exemptions make a clear showing of entitlement and in informing the parties at the hearing of what he believes to be the general policies and standards which they must meet.

The nature of the hearing; the process of proof. In their general atmosphere as well as their procedure, exemption hearings are ordinarily informal. Smoking is permitted and, depending on the number of persons present and their general relationship, the hearing may develop either into a delightful and orderly round table conference or a noisy debate between the opposing parties. Attorneys representing the parties do not usually act as trial attorneys at all; rather they act as general shepherds of their witnesses, present them, and themselves make statements in the form of testimony. Witnesses are not sworn; testimony is usually presented in the form of direct statements rather than by the question and answer method. In the earlier hearings, cross-examination was

not permitted; all questions were required to be submitted to and asked by the presiding officer. Because staff members of the Branch believe that cross-examination in exemption cases is a useful device to get at the facts,[81] this limitation has since been largely abandoned and is used as a threat which will not be invoked unless the privilege is abused and the hearing becomes too disorderly.

All hearings are recorded; copies of the transcribed record may be purchased from the stenographer. No rules of evidence are applied at exemption hearings; as stated by the presiding officer at the opening of one of the hearings, "We will consider everything that is offered for the record and give it such evidentiary value as it merits." Witnesses are requested to try to "confine their statements and testimony as closely as practicable to the purposes of the hearing." Objections are not ordinarily permitted at all; instead, parties are instructed to present their cases by direct statement when their turn comes. Ex parte statements are frequently submitted, made a part of the record and considered; such statements include telegrams favoring or opposing the applications, factual evidence, and technical data. The limitations applicable to wage order hearings are not observed; at one exemption hearing, an attorney's offer of a statement

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81 Concerning the original rule forbidding cross-examination, the representative of one trade association stated, "We found the rule unfortunate because it prevented us from correcting the testimony of opposing witnesses by putting questions which would have been found to bring about corrections. These questions would be either questions of fact, or of technical knowledge, neither of which the Administrator would be likely to know because he cannot expect to be an expert on the facts of every industry that appears before him."

prepared by an absent economist was admitted over objection, although the offerer knew nothing of the facts contained in the statement and could not be cross-examined thereon. Further, records of prior proceedings involving different applicants but related questions may be incorporated through announcement by the presiding officer. The reception of post-hearing material is common; ordinarily (although the practice has not been altogether formalized) copies of such material are required to be sent to all persons appearing at the hearing and opportunity is afforded to submit material in rebuttal.

The regulations governing hearings on learner, messenger, and seasonal exemptions provide for compelling the giving of testimony (i.e., "The Administrator or his authorized representative may cause to be brought before him . . . any witness whose testimony he deems material to the matters in issue"). In two exemption cases, the notice of hearing expressly provided that "For the purpose of this hearing, the presiding officer shall have all the powers conferred on the Administrator in Section 9, relating to the attendance of witnesses and the production of books, papers and documents."[82] In only one exemption case has there been a request

82. There is some doubt concerning the authority of the Administrator to delegate the power to issue subpoenas, since the Federal Trade Commission Act gives such power to the Commission only, and not to examiners. The source of authority may lie in section 4(c) of the FLSA, which provides that "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." (underscoring supplied). See supra, footnote 62.

for a subpoena; the request was subsequently withdrawn.

Preparation of the decision. Upon the completion of the hearing and the receipt of briefs (which are not often filed), the presiding officer, after whatever study of the record he deems necessary, confers with the assistants who sat with him and reaches his decision. If the case is complex, requiring a lengthy opinion, the task of drafting the decision is usually delegated to one of the subordinates in the Hearings Branch. Thereafter, the draft is reviewed by the senior examiner of the unit in whose jurisdiction the type of exemption involved lies, the General Counsel's attorney, and the economist who sat at the hearing, and, finally, the presiding officer. If the hearing was conducted by one of the two assistants to the Director of the Branch, the latter is also consulted in the course of the preparation of the decision. Where the action is not based on a hearing, but is a denial forthwith, or a prima facie determination of entitlement, the examiner to whom the case has been assigned prepares a short letter and a form sheet, which are then considered and approved by the appropriate senior examiner and, where necessary, by the Director of the Branch or by a person designated by the Administrator.

It should be noted that only the regulation governing the procedure for the consideration of applications for the seasonal exemption requires that the findings of fact which are prepared shall be based upon the record [Section 526.6(e)]. In decisions on other types of applications, the Hearings Branch

utilizes its special knowledge to some extent; thus, one decision relied in part for its finding concerning the tendency of plants to migrate South on the record in another hearing; in another case, the presiding officer made a finding concerning the applicant's income - a fact upon which there was no evidence in the record. But extra-record material or knowledge is used largely for background purposes in the decision; for the basic findings, the Branch relies on evidence in the record.

The form and effect of the decision. Where the decision is reached without a hearing, no formal opinion is prepared. If, for example, an application for apprentices, handicapped workers, or learners is granted, the decision is in the form of the certificate itself. A denial is also unaccompanied by formal opinion; rather it is issued on the same certificate with the word "Denial" stamped thereon in red ink. Two lines are provided on the certificate for setting out the ultimate grounds of denial. In addition, an informal letter explaining the general policy involved and the specific grounds for denial is sent to the applicant.

On the other hand, in all exemption cases where hearings are held, elaborate opinions, more recently shortened, are prepared. These opinions include argumentation, findings of ultimate fact, and conclusions of law. In their general tenor, these opinions vary: Some are compact, reasoned and footnoted; others have tended to be somewhat sprawling and disputatious. As a whole, however, as a commentator has written, these opinions proceed "with the closely-

reasoned formality of a judicial decision. The Wage and Hour Division seems to break cleanly away from the oft-criticized tendency of administrative tribunals to keep secret the reasons for their orders."[83]

The decisions of the Hearings Branch on applications for exemptions are not in the nature of intermediate reports or proposed findings of fact, but rather have the same force and effect as decisions of trial courts - final unless appealed and reviewed. In application cases, this would seem to be a wholly necessary step: In so far as possible, the Administrator must be relieved of the burden of considering these many small cases by being permitted to delegate the power of decision to responsible subordinates.

Reconsideration. The regulation governing the procedure for handling applications for apprentice exemptions provides that after initial denial or granting of a certificate, "Upon the submission of additional material facts an authorized representative of the Administrator may reconsider an application and affirm, revise or reverse his former action." Although the regulations dealing with the other exemptions have no comparable provision, in fact the procedure is the same. Particularly in relation to applications for learners' exemptions, reconsideration is comparatively frequent; although the number of such requests cannot be

83. Frank E. Cooper, The Coverage of the Fair Labor Standards Act and Other Problems in Its Interpretation (1939) 6 Law and Contemp. Prob. 333, 346.

ascertained, it is estimated that in about sixty cases there has been self-reversal of an original denial. It is asserted that there will be no reconsideration, however, unless new and material information is submitted. As described below, the comparatively large number of reconsiderations may well be due to the existing confusion concerning the line of demarcation between petitions for reconsideration and petitions for review, and the internal methods of handling each, and, accordingly, it may be assumed that the frequency of reversal upon reconsideration is only a temporary phenomenon.

Review of the decision; petitions for review. Section 523.11 of the regulations governing the procedure pertaining to applications for messenger exemptions provides that

> "Whenever it shall appear that . . . review . . . will cause undue delay in arriving at a determination or decision, the Administrator may delegate [his authority] . . . to make the determination or decision to the Deputy Administrator, any one of the Assistant Administrators or the General Counsel. Action so taken shall not be subject to review by the Administrator under Section 523.9 of these regulations." 84

With this single exception, each of the regulations dealing with applications for any of the five exemptions provides that "any person aggrieved by the action of an authorized representative of

84. This provision was added to the original regulation because of special circumstances: The applicant was desirous that the application be acted upon promptly. Accordingly, the notice of hearing stated that "Whereas, it has appeared . . . that a final determination is desired and should be arrived at at the earliest possible date", the General Counsel was designated as presiding officer and his decision was to be final. In fact, the application was withdrawn immediately before the scheduled hearing.

the Administrator may file a petition with the Administrator requesting a review by the Administrator of the action of the representative." Action as to which petitions for review may be filed include denials without a hearing; in all cases where there has been hearing, notice of the right to file a petition is published in the Federal Register. In seasonal and messenger exemption cases, the petition must be filed within 15 days after the "action" of the hearing officer; as to learners, the prescribed period is 15 days after "publication of the initial action"; and as to handicapped workers and apprentices, the period is 15 days "or within such further time as the Administrator, for cause shown, may allow." The petitions are required to state the precise grounds on which error is claimed.

Procedure for consideration of petitions for review. It will be noted that there is no appeal as of right from the decision of the Hearings Branch; rather the petition for review operates in a manner parallel to a petition for certiorari to the United States Supreme Court. Whether or not the petition will be granted rests within the discretion of the Administrator or (as is expressly provided by the learner regulations) of an authorized representative. Remarkably few petitions have been either filed or granted; so far as can be ascertained, as of December 15, 1939, one petition for review in a seasonal case and one in an apprentice case were granted and the original actions were modified; in the only messenger case, the petition was granted and the finding affirmed;

and two petitions from findings on industry hearings involving learners had been granted. Recently, the Administrator received the first petition for review of a denial of an individual application for a learner exemption. No petitions involving handicapped workers have been filed. As noted immediately below, however, it has sometimes been difficult to distinguish between petitions for review and requests for reconsideration; the former have on occasion been treated as the latter, and the Branch itself has changed its initial decision without necessitating further steps by the Administrator and his staff.

The machinery governing the consideration of petitions for review is still in the process of development; the procedure actually obtaining is somewhat indefinite because the choice has not yet been made between placing the major burden upon the Hearings Branch on the one hand and on the other, relieving that branch of any power in the premises and vesting it in the General Counsel's office. Dominance of the latter theory is discernible in the procedure governing seasonal exemptions; consideration of petitions for review in other types of cases seem largely to be left to the Hearings Branch. Thus if a seasonal application is denied by the Hearings Branch, objections will be treated forthwith as a petition for review and the case moves from that Branch to the General Counsel's office. In contrast, however, objections to the Hearings Branch's determination as to other exemptions are ordinarily handled by the Branch itself. Except in the case of learners, the regulation governing which expressly requires that "the petition for review

will be examined by the Administrator or an authorized representative who has taken no part in the action which is the subject of review," requests for review are ordinarily considered by the same officer who issued the original decision; even in the case of learners, the Branch itself retains jurisdiction, but an official other than the one who made the original decision considers the petition. Just how petitions in exemptions other than seasonal ultimately reach the General Counsel's office is somewhat obscure; in fact, the tendency of the Hearings Branch seems to be to retain jurisdiction over the case, to engage in protracted correspondence with the applicant, and to transfer the matter to the General Counsel's office only when a complete impasse is reached and the applicant flatly demands it. It is stated that it is at least possible that the small number of petitions for review is due to the fact that applicants often become exhausted and give up before the petition is finally transferred to the General Counsel's office.

Several factors underlie the somewhat unsatisfactory procedure governing petitions for review. As already noted, the Division has had difficulty in definitely fixing its policy as to whether these petitions should be the concern of the Hearings Branch or of an entirely new group, the General Counsel's office. From this indecisiveness, certain practical consequences have flowed. The regulations themselves are obscure on the point; they fail to apprise the applicants of any distinction between requests for reconsideration and petitions for review. Accordingly, aggrieved applicants not infrequently address new arguments to the Hearings

Branch. Further, the confusion is reflected in the Division's mailing division, which, because of the difficulty of distinguishing between reconsideration and review requests, forwards petitions to the Hearings Branch. Once the request has reached that Branch, partly because it is felt that as long as it has come to rest there, partly because of a desire to relieve the General Counsel's staff of a comparatively unfamiliar burden, partly because of a natural distaste on the part of the Hearings Branch to be reviewed where it may straighten the matter out itself, the Branch has, as described, retained jurisdiction. Since seasonal cases are said to involve matters of judgment on agreed facts to a greater extent than the other exemptions, and since they are of more extensive consequence governing hours for entire industries, they are excepted from the general rule, and, therefore, petitions as to them are handled directly by the General Counsel's staff.

Petitions which reach the latter office are handled initially by the review unit of the General Counsel's office. The Administrator's attorneys in that unit do not read the entire record in determining whether to grant the petition. In general, they rely on the statements contained in the petition. Again, except in seasonal cases, there is no separation between the review attorneys and the Hearings staff; even as to petitions relating to seasonal exemptions, the review attorney not infrequently seeks the views of an official in the Hearings Branch. Members of the latter staff thus may submit recommendations and may be consulted concerning the

question whether the petition should be granted.

The purpose of such consultations is informational. Under the circumstances, it seems almost necessary for the review attorney to turn to the Hearings Branch to discover the general nature and difficulty of the problems involved if he is to be spared analyzing the entire record. If he must thus analyze it, the limitations sought to be achieved by these petitions in the nature of certiorari would be wiped out and each case would have to be examined on its merits. Thus, the real difficulty may be in the fact that absent consultation with the Hearings Branch or, in the alternative, a complete reexamination of the case, the determination whether to grant the petition must at present be based on an ex parte, and not always very elaborate, document of the person seeking review. Intelligent decision whether to grant review merely on a document of this nature would seem ordinarily to be impossible except in those cases where only questions of law or policy are involved. The solution, however, seems to be to require complete and specific petitions for review, which should be submitted to all persons who have participated below, and such persons should be afforded an opportunity to submit counter-petitions setting out their views and the material supporting the original decision. Although such a procedure may seem to be over-elaborate for comparatively simple cases, it is a necessary one if it is deemed important to diminish the role of the Hearings Branch in the determination. Certainly in seasonal cases, where that Branch does not participate, it would seem that intelligent determination

must proceed on more than the bare petition of one of the parties aggrieved.[85]

It is suggested, however, with considerable force that the entire procedure for the consideration of petitions for review is confused and that more than fuller petitions are in order. Instead, it is urged, distinction should be made between the several types of exemptions which must be considered. Where the issue involved is a "yes or no" question--that is, in seasonal cases or those involving individual applications for learners, where the facts are simple and the issue is whether, on such facts, discretion should be exercised and the application granted--further action by the Hearings Branch after its initial decision is unnecessary. The applicant, indeed, may be notified after denial that he may present further facts; if, however, this added bite at the cherry does not move the Hearings Branch, the issue is clean-cut and the only step left is review. In such cases, the review is simple: Briefs can be called for from both parties, and the appellate action can ordinarily be taken on the basis of such briefs. Consideration of briefs can, as a matter of fact, constitute the entire review unless the Administrator feels that oral argument would be helpful. A different situation is presented, however, by the Hearings Branch decision governing

85. Except in one case, the denial of a petition for review has not been accompanied by any sort of opinion. In the one exception - the reason for the existence of which Division officials are unable to explain - the decision was brief and formal, simply reciting the history of the case, and that upon consideration of the record and other documents, the original findings were affirmed and the petition was denied. The decision was signed by the Administrator.

learners for an entire industry. There, no "yes and no" problem is involved; rather the findings are, as already noted, not an adjudication at all but a regulation. As regulations, they should be issued in the first instance not by the Hearings Branch but by the Administrator. If they were there recognized as agency regulations, problems of machinery for review would disappear. The constant reconsideration which now marks all exemption issues (except seasonal) would be reserved for the industry learner findings; since they are regulations, they would properly be subject to continuous modification in the light of new facts, conditions and arguments. And, similarly, there would be no troublesome questions of review at all; once recognized as the Administrator's regulations, it seems to be obvious that the Administrator would subsequently be free to consult or use any other means to obtain information to determine whether the regulations should be changed. In this manner, it is argued, the Hearings Branch would be allowed to retain full power in the premises where it is useful and important, and immediate review could be had by applicants where an adjudication has been made as to individual applications.

Procedure when petitions for review are granted; hearings. The regulations governing the procedure concerning applications for each of the five exemptions provide that

> "If the request for review is granted, all interested parties will be afforded an opportunity to be heard either in support of, or in opposition to, the matters prayed for in the petition. A notice of the time and

> place and scope of the hearing will be published in the Federal Register and made public at least 5 days before the date of such hearing." 86

In pursuance of this provision, notice is not only published but is mailed to all persons who appeared in the hearing below or, if there was no hearing, who are known to be interested. The precise content of the notices varies: It may include a simple statement that "whereas petition for review was filed, notice is given that the Administrator will review the determination" at a certain time and place or it may set out the specific questions which shall be considered. The determinative factors seem to be whether there has been any change in the issues and whether the number of potentially interested persons is large and shifting.

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86. There is some variation in the wording of these regulations. The handicapped workers' regulations provide that opportunity to be heard will be given "or other provision will be afforded interested parties to present their views." The learner regulation omits the clause stating that "opportunity to present their views" will be afforded interested parties. In fact, these differences are accidental and the same procedure is followed for all. It may be noted that variations in the regulations, although indeed not important, are quite common (see, e.g., footnotes 73 and 75). Some differences are intended to meet the varying demands of the exemptions sought; others have no sound basis and are generally attributed simply to the fact that they were drawn somewhat hastily before the effective date of the Act. The time would seem ripe for reviewing and coordinating the regulations so that meaningless variations could be omitted.

Hearings are conducted by the Administrator or the Deputy Administrator; the learner regulation in addition provides that the review may be either by the Administrator "or an authorized representative who has taken no part in the action under review." Sitting with the Administrator, but not participating actively in the hearing, are the review attorney and the economist who will subsequently assist in the preparation of the decision.

As indicated by the governing regulations, "all interested persons" may be heard in these proceedings: There is no requirement that they shall have participated below, but almost invariably no new parties appear. In one hearing, express provision was made for the intervention at the review hearing of a committee of holders of the bonds of the petitioner. Nor is there any limitation upon the scope of the hearing; it is asserted that, regardless of the petition, the entire record is reviewed. Indeed, some of the hearings before the Administrator were rehearings de novo, rather than oral arguments.[87] Witnesses were sworn and new evidence was permitted to be presented. On another occasion, however, while the review was in the nature of a rehearing, the issues were limited; whereas the original hearing was on the issue whether a certain industry was seasonal, the issue on review was expressly limited to whether specified operations of the industry were seasonal. Again, the review hearing may rather be in the nature of an oral

87. In one case, some repetition was avoided by incorporating the record of the hearing before the Hearings Branch into the record of the Administrator's hearing. The fact of incorporation was announced in the notice of the latter hearing and copies were made available to persons requesting them.

argument, while in one case, involving a petition for review of a denial of an application for a handicapped worker exemption, no review hearing was held at all, but instead, the Administrator sent a special investigator to the field and, upon the basis of the latter's report, modified the original decision.

Once again, these variations may be attributed to the fact that the procedures in these respects have not yet crystallized. Understandably, where the standards and policies are still being formulated, the Administrator may find it necessary in a particular case to begin all over again; and, at the same time, the varying types of problems require flexible methods for "affording interested persons an opportunity to present their views." But it is to be noted that more recently there have been indications of a more uniform policy: In reviews granted during the last few months, interested persons have been limited to the filing of briefs.[88] In the normal case, no reason appears why the parties need more than this.

Preparation of the decision. The Administrator's decision in exemption cases is prepared, in general, in a manner similar to the wage order decision. The record is digested and analyzed, and the draft of the opinion prepared, by a review attorney assisted by an economist who attended the hearing before the Administrator

88. Briefs in any event are permitted in review hearings. For example, in one notice of hearing on review, briefs in support of the petition were required to be filed at the opening of the hearing; five days additional were permitted for briefs in opposition. If the briefs were typewritten or mimeographed, ten copies were required, if printed, 20 copies. It was also announced that "Copies of such briefs will be furnished on request to the extent practicable, and copies may be examined" at a designated place.

but did not otherwise participate in any stage of the case - except that in all probability the review attorney did assist in the determination of the question whether the petition should be granted. Except in seasonal cases, where, again, the insulation is carefully preserved, the review attorney has in the past informally discussed the case and its issues with the staff of the Hearings Branch; consultation has been especially frequent in respect of review of learner findings covering an industry.

Ordinarily the Administrator's decision is accompanied by a reasoned opinion of considerable length, including a full discussion of the conflicting contentions and evidence. The normal policy of preparing such opinions was not followed in one case involving a seasonal exemption where the opinion was limited to a statement of the ultimate conclusions concerning which operations were seasonal and which were not. Staff members state that no reasoned opinion was prepared in this case because the issues were confused and complex and after several unsatisfactory drafts, the attempt was abandoned.

C.

REGULATIONS

Powers; regulations issued. Although Section 16 of the original bill gave to the Administrator a general rule-making power, the provision was ultimately omitted; the Act now vests in the Administrator only certain specific powers of implementation

by regulations. As discussed in Section B of this monograph, the Administrator has been given powers to dispense exemptions for learners, apprentices, handicapped workers, messengers and employees engaged in seasonal occupations - exemptions granted upon individual applications. Although no express power is contained in the statute, the Administrator has supplemented the case method of granting exemptions by issuing a separate regulation for each of these exemptions. The regulations concerning apprentices, messengers, and handicapped workers simply set out the procedure governing the applications for such exemptions.

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89. There has been considerable criticism directed against the lack of a general rule-making power; employers complain that they do not "know where they stand" in the absence of the Administrator's power to issue binding rules. "/Apart from the lack of funds/ perhaps the outstanding difficulty from the point of view of employer compliance, has been the lack of administrative rule-making power . . ." Samuel Herman, The Administration and Enforcement of the Fair Labor Standards Act (1939) 6 Law and Contemp. Prob. 368, 378. An amendment (H.R. 5435, 75th Cong., 1st Sess.) to authorize the Administrator to issue regulations to the extent "necessary or appropriate to carry out the terms of the Act" was proposed last year and was approved by the Administrator. The bill would have made reliance on any regulation a bar to civil or criminal penalties. There is, however, some sentiment that the granting the power would impose upon the Administrator an overwhelming burden and would subject him to added pressures. Nor would it be helpful to employees. See Herman, supra, at p. 379, footnote 73.

The learner exemption is something of a hybrid: Its body prescribes procedure, but there is appended a statement of the general substantive requirements for entitlement. This substantive statement is not a part of the regulation proper, although applicants often so regard it; in any event, the statement has proved to be most useful in obtaining proper and complete applications. The seasonal regulation, finally, not only prescribes the procedure but includes a general substantive definition of what constitutes seasonality within the meaning of the Act.

In addition, the Act empowers the Administrator to supplement certain exemptions by defining the statutory phrases. Section 7(c) exempts from the maximum hours requirements for a period of not more than 14 weeks in the year employees working for an employer engaged in "the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations . . ." Similarly, Section 13(a)(10) exempts entirely from the operation

of the Act "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products." Pursuant to these provisions, the term "area of production" has been defined by Part 536 of the regulations, as several times amended. Further, Section 13(a)(1) exempts "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)"; Part 541 of the regulations accordingly defines these terms, and is now undergoing revision. A final definitional power is granted by Section 3(m), which provides that the term "wage" as used in the Act "includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." A general regulation, Part 531, establishes the broad method whereby the "reasonable cost" of such facilities may be determined; in addition, the regulation prescribes procedure, described below, whereby individual determinations may be obtained.[90]

90. Whether Section 3(m) permits of a general regulation, as was issued, or requires individual determinations in all cases, was the subject of recent litigation in which the Division's issuance of 531 was upheld. Morgan v. Atlantic Coast Line R.R., Civ. Action No. 20, S.D. Ga., argued Dec. 13-14, 1939; decided (unreported) Feb. 17, 1940. The Government argued in its brief that "the construction adopted by the Administrator (continued)

Finally, the Administrator is expressly empowered to supplement the Act in two other respects: (1) he "shall by rules and regulations prescribe the procedure to be followed by the [industry] committees" [Section 5(c)]; and (2) employers subject to the Act shall keep such records and make such reports to the Administrator "as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder" [Section 11(c)]. Parts 511 and 516 (as three times amended and supplemented) of the regulations have been respectively issued pursuant to these two provisions.

Issuance of the original regulations; consultative and other methods. Since the Act became effective 120 days after its passage, since it was necessary to issue regulations before the operative date of the Act, and since the Wage and Hour Division had a very small band of employees at its disposal in October 1938, the regulations, of necessity, were not preceded by hearings. Instead, either

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90. (continued)
is the only one which will permit the statute to operate in a reasonable manner. . . . There must be at least several hundred thousand employees . . . who are furnished facilities by their employers . . . If the Administrator were required to hold hearings, take evidence, hear argument, and make findings and a final determination as to each facility, the time consumed would run into years.

"The Administrator's construction of Section 3(m) avoids these difficulties. He interprets the section as permitting the establishment of a rule which will advise persons . . . how they may calculate the 'reasonable cost' of facilities furnished . . . [and] the regulation permits any person to petition the Administrator for a hearing in order that his individual costs may be determined. Inasmuch as the regulation was regarded as adequate by representatives of the major industries furnishing facilities to their employees [see infra, note 91], the number of such petitions would presumably be small enough to be susceptible of reasonably rapid determination. Thus those persons who wanted a finding as to their own particular costs could get it without rendering the entire statutory scheme unworkable."

wholly internal or consultative methods were utilized.

Of the regulations issued, only 511 (dealing with procedure for industry committees), 522 (learners), 523 (messengers), 524 (handicapped persons), and 526 (seasonal exemptions) were issued without consultation with outside parties. Of these, 522 and 523 simply prescribed the procedure for filing and considering applications; 524 included some minor provisions which may be regarded as substantive. Because they were considered procedural, the Division felt that outside reference was unnecessary. Part 526, however, included substantive provisions in that it contained the basic definition of seasonality and thus set out the qualifications under which an industry would be entitled to an exemption. Rather than consult interested or affected persons, the Division's legal staff made a carefully documented study of the legislative history of the seasonal exemption prior to the issuance of the regulation. Officials assert that the problem of general definition was one wholly of legal interpretation, upon which affected persons could shed little light. Although it is water over the dam, one must hesitate to agree that expert assistance through conference, and the opportunity of interested persons through their attorneys to present their views upon the proper legal interpretation, would have been wholly useless.

As to the remaining regulations, there was considerable reference to outside parties, supplemented by whatever investigations were possible within the limitations of time. Thus prior to the issuance of the definition of the term "area of production,"a joint legal and economic study was made to investigate the practical effects of a variety of possible

definitions; simultaneously, conferences were held with experts attached to the United States Department of Agriculture, and with representatives of labor and of the cotton compress and warehouse industry, the raw cotton trade, the egg handling industry, the grain elevator industry, and others. In the case of the regulation dealing with the keeping of records, 500 copies of the tentative drafts were distributed to affected persons for comment and suggestion; in addition, a conference on the basis of the draft was held with representatives of industry. The issuance of the definition of executive, professional, and administrative employees was preceded by a conference with representatives of both employers and labor organizations. Similarly, the regulation dealing with the computation of the "reasonable cost" of facilities which may be included in the computation of wages was issued only after a conference with the representatives of each of the major industries whose employers furnished employees with such facilities.[91]

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91. A detailed description of this typical conference was included in an affidavit of Assistant General Counsel Rauh, submitted in Morgan v. Atlantic Coast Line R.R., cited in footnote 90 above. On or about October 10, 1938, the Administrator requested the Assistant to the chairman of the Business Advisory Council of the Department of Commerce to notify all representatives of the major affected industries that a conference was to be held on the question. On October 17, 1938, the conference was held; industrial representatives included officers of the National Lumber Manufacturers Association, the Coal Association, the National Petroleum Association, the Textile Association, Southeastern Railways, the American Mining Congress, and the National Sand and Gravel Association. Also present was the Assistant to the Chairman of the Business Advisory Council, representatives from the Bureau of Labor Statistics and the Women's Bureau, and the Division's Administrator, Deputy Administrator, General Counsel, and, as presiding officer, an Assistant General Counsel. At the opening of the conference, the latter distributed copies of a proposed regulation which had been prepared by the Division; he explained that it was "purely tentative . . .
(continued)

Amendment of regulations; petitions; hearings. With the exception of Parts 511 (industry committee procedure) and 526 (seasonal), each of the regulations provides that

> "Any person wishing a revision of any of the terms of the foregoing regulations . . . may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment . . . is set forth, [he] will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes."

This provision is omitted in Part 511 because it deals with internal procedure. Part 526 has excluded the provision because, it is asserted, the seasonal definition is "in accordance with the legal interpretation based upon the legislative history of the Act." Therefore, it is felt that the appropriate method of handling requests for revision of this regulation is by written brief and conference rather than by a fact-finding hearing; requests for revision, accordingly, are considered by the General Counsel's staff. It may be suggested that the right to request revision by these methods might advantageously be announced in the regulation: The absence of any indication of a right to request

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91. (continued)
as a basis of discussion; that in view of the fact that the Act went into effect October 24, seven days later, speed was essential and it would not be possible to hold hearings on particular industries." Discussion followed and defects in the draft were disclosed. At noon, the Assistant General Counsel appointed a subcommittee, composed of representatives of three of the associations, to draft a new proposal. After lunch, this new draft was submitted, discussed and adopted by the vote of those present (Division members not participating). This draft was subsequently approved by the Administrator and issued as a regulation. The conference lasted an entire day.

A subsequent attack on the regulation, grounded on asserted unconstitutionality arising from the failure to hold a hearing, was rejected in the Atlantic Coast Line R.R. case.

revision, in contrast to the provisions in the other regulations, may leave outsiders altogether unaware of the right, although the fact that there have been requests for amendment tends to show that the danger is not a great one.

Petitions for amendment to the regulations have been numerous, although their number is now decreasing. There have, it is estimated, been "hundreds" of formal and informal petitions to amend the definnition of the term "area of production" and many to amend the record regulation and that defining executives. In all, five hearings have been held as a result of petitions for amendments. Four of these have been concerned with the definition of "area of production" and of these four, three resulted in amendment, the third leading to a sweeping redefinition. A fifth hearing resulted in an amendment to the records regulation by requiring special methods for recording the wages of industrial homeworkers. A sixth hearing, on the question of revision of the definition of executives, administrative workers, and the like, is scheduled to be held shortly. In addition, of course, the Administrator may proceed upon his own motion and has done so in one case where a hearing led to a revision of the records regulation to require particular records for station porters.

It is important to note that this process of petitions and hearings is, actually, less a matter of amendment than of shaping and perfecting the original regulations, which may fairly be described as tentative in form. Operating in a new field, with few helpful guides, the Administrator has wisely and necessarily chosen not to exhaust his powers at the outset, but to adopt a policy of permitting the regulations

to be moulded in the light of practical experience concerning their operation. The suitability of this process has been described by a commentator, who has written

> "In connection with such complicated matters as determination of 'reasonable cost' or definitions of 'seasonal nature' or 'area of production,' administrative devices have been designed to permit adequate application of general legislative concepts to particular situations, tosubstitute pedestrian fact finding hearings for dispositive administrative formulations. Legally, the Administrator could, within his discretion, prepare and issue definitive regulations binding without recourse, except in the courts, upon the persons involved. An examination of the regulations shows that the method adopted has been open and flexible, relying heavily upon a continuous hearing procedure not required by law, but effectuating the administrative policy that regulatory definition be slow and cautious where economic effect is unmeasured." 92

Petitions for amendment are handled in the first instance by the Hearings Branch, in which an Assistant Director has been assigned the task of initial scrutiny of such requests. The exact procedure, of course, varies according to the formality and importance of the petition. All requests are answered; the reply is prepared for the signature of the Administrator or, if the petition is frivolous, for the signature of the Director of the Hearings Branch. The majority of petitions, as may be expected, can be disposed of simply; where any serious problems are raised, the Hearings Branch consults with the General Counsel's staff, other members of the Division, and, on occasion, with the Administrator. Questions which are described as "tricky" are, in any event, submitted to the General Counsel's office before action is taken.

92. Herman, op. cit. supra, note 89, at pp. 380-381.

If it is determined to hold hearings, the procedure, in general, is similar to that described above in relation to exemption hearings. In accordance with the requirements of each of the regulations which provide for petitions for amendments, due notice is given through general press release, publication in the Federal Register, and notice by mail to applicants for amendment and to all persons, trade associations, and unions which have communicated with the Division concerning the question at issue. The notice sets out the problem to be considered with varying degrees of specificity. Thus the notice prior to the hearing in the keeping of records for porters simply set the question as "What, if any, amendments should be made to Part 516 of the Regulations . . . to require special or additional records to be kept by employers of red-caps or hand-baggage porters?"; in another case, the precise amendment applied for was set out in the notice, but the question was announced as "what, if any, amendment" on a stated part of the regulation should be made; in a third notice, on the hearing concerning industrial home-workers, it was announced that "Whereas the Administrator is considering the desirability of amending . . . the regulations to require special or additional records to be kept by employers of industrial homeworkers, such as: date work is given to and returned by industrial homeworkers, amount of work given, list of articles worked on, operations performed and hours worked; therefore, notice is given of a public hearing . . . on the . . . question: What, if any, amendments should be made to Part 516 of the Regulations . . . to require special or additional records to be kept by employers of industrial homeworkers?"

Hearings are scheduled between fifteen and twenty days after the notice.

The conduct of the hearing is similar to exemption hearings: Testimony is by direct statement and cross-questioning is at the discretion of the hearing officer. Two weeks are ordinarily granted for the filing of briefs. The practice has varied concerning the actual internal course of the amendment. The first hearing, concerning a limited redefinition of the area of production to include or exclude the processing of dry edible beans, was conducted by the General Counsel's office. The presiding officer issued no decision or report, but prepared a memorandum for the Administrator, which the latter adopted and issued as the amendment. All other hearings were conducted by the Hearings Branch. In the red cap[illegible] hearing, the presiding officer made extensive findings of fact and concluded with a recommendation set out in the decision. Although this opinion was made public, no review or oral argument was provided, and the Administrator adopted the recommendations after study and examination by the General Counsel's office. In the hearing held upon the application of Puerto Rico sugar processors to amend the term "area of production", the hearing officer, again, prepared and issued findings of fact, but concluded that since the applicants' operations were not within Section 13(a)(10) of the Act, the petition had to be denied. Since this was a legal opinion, the Administrator, two days later, formally announced his affirmation of the decision.

In these four cases, the decisions of the Hearings Branch differed in form from those in exemption cases since they were not final in the absence of appeal, but were regarded as internal intermediate reports requiring further action by the Administrator. In the fifth hearing, which resulted in a complete redefinition of "area of production" and was far broader than the other hearings, the concept of the advisory role of the Hearings Branch was fully articulated. A presiding officer of the Branch conducted the hearing and prepared a report in the nature of findings and a recommended amendment. Because of its importance, and since the recommendation went beyond the petition for revision, the Administrator himself held a new hearing upon the recommendation. The recommendation was set out in full in the notice, and new evidence and testimony were received by the Administrator. Thereafter he issued the amended regulation.

It is to be noted that hearings on amendments are often supplemented by special investigations and conferences with outsiders, both before and after the hearing. The Division in preparing its decision and issuing the regulation, does not consider itself limited to the evidence in the record. As a general practice, it is asserted, however, the regulations which have been issued are based on the evidence in the record and on the findings based on such evidence.

Other methods leading to amendments. There have, in addition, been a number of amendments which were not preceded by

hearings. In one case, amendment occurred upon a petition without hearing, since a similar issue had been decided shortly before. Procedural amendments concerning industry committees, and learner, messenger, and other applications, have been issued without outside reference. Extensive consultation and investigation have been conducted with a view toward substantive revision of the handicapped worker regulation. In connection with its projected regulation concerning the employment of handicapped workers in "sheltered workshops", conferences have been held with representatives of social agencies engaged in rehabilitation work for handicapped workers; the Division has sent questionnaires to 428 such workshops and has received 178 replies covering 9,890 clients; and, finally, the Administrator has appointed a Sheltered Workshop Advisory Committee to study the problem, collect information, and make recommendations.

II

OTHER ADMINISTRATIVE ACTIVITIES

Determination of "reasonable cost" of facilities. As has been described above, under Section 3(m) the Administrator is empowered to determine the reasonable cost of facilities furnished to employees which may be included in the computation of wages; and, accordingly, he has issued not only a general regulation but has provided for procedure whereby individual determinations may be made. Applications to obtain such determination may be filed either by employees or by the employer; in addition, the Administrator may hold a hearing on his own motion. If application is filed, the regulation in terms makes hearings mandatory through its provision that "hearings will be held". In all cases, when the hearing is set the employer is required to notify his employees of the "place, date and purpose of the hearing by posting notices thereof in conspicuous places on his premises." It is required by the regulation that the hearing be held, either by the Administrator or his duly authorized representative, at a place "which shall be as close to the employer's place of business as reasonably possible."

As yet, there have been no applications for individual determinations and no hearings held.

Issuance of advisory letters and interpretative bulletins. The absence of a general rule-making power, coupled with the frequency with which vague and general terms appear in the Act, have

combined to leave important gaps in the Act. But, believing that "If the mandate of the Act is to be effective its provisions must be widely understood and obeyed,"[93] the Division has devoted a great deal of care and effort to advising employers and employees concerning their rights and duties, and an opinion unit has been set up in the General Counsel's office to fulfill this duty. Questions arising with the greatest frequency were made the bases of interpretative bulletins, fourteen of which have been issued, dealing with coverage, methods of payment, and other problems. Ordinarily, the bulletin bears the legend that the interpretations "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties, unless he is directed otherwise by the authoritative ruling of the courts, or unless he shall subsequently decide that a prior interpretation is incorrect." The Bulletins are not, of course, binding; a condition which has led a commentator to observe that "Rule making so severely restricted is, in view of the need for industrial certainty, meeting Goliath with a sling shot, a romantic but risky

93. "Within a few weeks [after the passage of the Act] more than 100,000 inquiries had been received . . . As a practical matter, it was necessary for the Administrator to adopt criteria for the guidance of himself and his agents in the work of administration and enforcement, and it seemed equally necessary that persons subject to the laws should be forewarned of these criteria.

"Refusal to give interpretations upon request would undoubtedly have resulted in competitive inequities . . . To avoid the possibility of confusion, and also in order to facilitate administration and enforcement . . ., it was decided that individuals making inquiry were entitled in all fairness to the best opinion of the General Counsel as to the scope and effect of the law." Annual Report (1939) p. 17 ff.

business."[94] In form and style, they have been described as

> "legal essays in statutory construction. Except that they do not discuss actual fact situations presented for legal opinion, they are the type of legal discussion customarily prepared by legal staffs of administrative agencies to guide administrative officials in the performance of their statutory duties . . . They attempt to achieve binding effect by persuasive reasoning, simple phrasing, and relative informality . . . There is no attempt to support analyses by legal citation . . . While the bulletins attempt to speak accurately, there is a minimum of technicality. It is apparent that they are designed for laymen as well as lawyers. A continuity is established by cross reference from later to prior bulletins. The bulletins are interesting adventures in legal persuasion."[95]

In addition to the interpretive bulletins, when a question not covered by them recurs frequently, answers are issued as a release in mimeographed form, thereafter used when the inquiry arises. Finally, the Division has adopted a policy of utmost liberality in replying to individual inquiries. No technical limitations have been imposed with respect to the form or proposer of the inquiries. If sufficient facts are stated, an opinion is expressed, accompanied, of course, by the warning that it is advisory only. These informal opinions are issued over the signature of an Assistant General Counsel in charge of the opinion unit.

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94. Herman, op. cit. supra, note 89, p. 379.

95. Id., pp. 379-380. The bulletins have been drafted "in persuasive rather than decretal language." Cooper, op. cit. supra, note 83, p. 334.

PART TWO

THE CHILDREN'S BUREAU

The statute. Included in the Fair Labor Standards Act are provisions relating to child labor:[96] Section 3(l) defines "oppressive child labor" as, in general and with certain exceptions, employment (except by a parent or guardian) of a minor under 16 years of age; Section 12(a) prohibits oppressive child labor as thus defined, and declares that "no producer, manufacturer or dealer" shall ship into interstate commerce "any goods produced in an establishment in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed"; and Section 13(c) provides for certain exemptions (children employed as actors, and those employed in agriculture "while not legally required to attend school") which are self-executing.[97] In addition, as discussed more fully below, children of 14 and 15 years of age may under certain circumstances be employed in non-mining and non-manufacturing occupations, while, conversely, employment of minors between

96. The child labor provisions are in many respects similar to the Child Labor Act of 1916, declared unconstitutional in Hammer v. Dagenhart, 247 U.S. 251 (1918). For a general study of these provisions and the Bureau's procedure, see Katherine Du Pre Lumpkin, The Child Labor Provisions of the Fair Labor Standards Act (1939) 6 Law and Contemporary Problems 391.

97. The sanctions are the same as those provided in the wage and hour provisions (see supra, pp.5-6), except that the section permitting civil suit for double restitution is not applicable and a second prosecution for goods shipped before the beginning of the first prosecution under the child labor sections is expressly forbidden while the latter is pending [§ 12 (a)].

16 and 18 years of age may be forbidden in "particularly hazardous" occupations [98] /§ 3(e)/. Employers may, but are not required to, obtain age certificates showing that minors whom they employ are "above the oppressive child labor age" /§ 3(l)/.

Administration: The Children's Bureau. Administration of the child labor provisions of the Act is separated from the administration of the wage and hour provisions; Section 12(b) of the Act provides that the chief of the Children's Bureau in the Department of Labor "shall make all investigations and inspections under Section 11(a) with respect to the employment of minors . . . and shall administer all other provisions of this Act relating to oppressive child labor." [99] Major responsibility for administration is, in turn, vested in the Industrial Division of the Bureau. A staff of seventy employees, including several who are assigned to cooperating State agencies and also including an attorney assigned from the office of the Solicitor of the Department of Labor, is engaged in the administration of the child labor provisions.

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98. The coverage of the child labor provisions of the Act is limited. It is estimated that from 30,000 to 50,000 minors under 16 "will be withdrawn from industry as a result of the Act. Yet at the time the . . . Act was passed a total of some 850,000 children 15 years and under were gainfully employed." Lumpkin, op. cit. supra, note 96, p. 401.

99. "When the . . . Act placed administration of the child labor provisions in the hands of the Children's Bureau it brought a great sense of relief to all who were concerned to see competent, unbiased enforcement in a spirit of public service. /Because of the Bureau's experience and expertness in the field/, obviously this is the administrative arrangement that should be made." Id., p. 393. The Children's Bureau was created in 1912 (37 Stat. 79) and was transferred from the Department of Commerce and Labor to the Department of Labor in 1913 (37 Stat. 737). Its chief is appointed by the President by and with the advice and consent of the Senate. Unlike the Wage and Hour Division, the Children's Bureau is not a semi-autonomous unit. All acts of the Bureau are subject to the approval of the Secretary of the Department of Labor.

Rule-making powers. As in the case of the wage and hour provisions, the duty of administrative implementation of the child labor sections is separate from the duties of enforcement. Adjudication of violations rests solely in the courts. In three respects, however, the Act empowers the Chief of the Children's Bureau to exercise administrative discretion through rule-making.

(1). Section 3(1)(2) provides:

> "'Oppressive child labor' means a condition of employment under which . . . any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau . . . shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; . . ."

Pursuant to this provision, two orders have been issued. Order No. 1, issued May 18, 1939, declares that occupations in or about plants manufacturing explosives or articles containing explosive components are particularly hazardous. Order No. 2, issued November 27, 1939, makes a similar declaration for the occupations of motor vehicle driver and motor vehicle helper. Under this same subsection studies of the sawmill and mining industries are under way. In addition, although there is no express authority therefor, Regulation No. 5, setting forth the "Procedure Governing Determinations of Hazardous Occupations," was issued by the Bureau on November 8, 1938.

(2). Section 3(1) further authorizes the Chief of the Bureau to

> "provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen

> years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that [she] . . . determines that such employment is confined to periods which will not interfere with their health and well-being."

In terms, this section seems to permit administrative exemption of particular industries, or even of particulr employees between the ages of 14 and 16; as a matter of administrative convenience, however, a single regulation (No. 3, issued May 8, 1939)[100] on a general occupational basis and covering all employment of minors 14 and 15 years old has been promulgated. In contrast to the hazardous occupation provisions, therefore, the power vested by the 14-16 year old provision has been fully exercised and, except, of course, for amendments, no further individual determinations are necessary.

(3). Section 3(1) establishes that oppressive child labor "shall not be deemed to exist by virtue of the employment" of any person "with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the child labor age." On October 14, 1938, the Bureau issued Regulation No. 1, governing the procedure and proof necessary for obtaining such certificates. In addition, pursuant to this section and Section 11(b), empowering the Bureau to utilize the services of State agencies, Regulation 14 (replacing Regulations 2, 4, and 6 to

100. Several temporary regulations dealing with the employment of 14 and 15 year old minors were issued and effective between October 24, 1938, and May 24, 1939.

13), was issued on October 26, 1939, designating 41 States and the District of Columbia "in which State age, employment, or working certificates or permits shall have the same force and effect as Federal certificates of age under the Fair Labor Standards Act."[101]

Exercise of the rule-making function. For the purposes of discussion of procedure, the regulations or orders may be divided into three groups whose issuance is accompanied by an ascending degree of formality: (1) Regulations No. 1 (age certificates), 5 (procedure governing determination of harazardous occupations) and 14 (designation of States agencies); (2) temporary regulations dealing with the employment of 14-16 year old minors; and (3) Regulation No. 3 (employment of 14-16 year old minors); and Orders No. 1 and 2 (determination of hazardous occupations).[102] The first group may be disposed of with brief discussion, since the issuance of these three regulations was quite properly accompanied by a minimum of outside reference. Only in the case of the designation of State agencies whose certificates of age are declared to be acceptable was there utilization of steps more extensive than internal consideration or consultation with other federal bureaus. Regulation No. 14, however, was preceded by special investigations by the Industrial Division of the Bureau, involving extensive study--including

101. On September 21, 1939, the Wage and Hour Division and the Children's Bureau jointly issued a regulation dealing with the utilization of State agencies in making investigations, gathering data and the like, pursuant to Section 11(b) of the Act.

102. As will be noted from the discussion below, the procedure for issuance of the hazardous occupation determination is somewhat more elaborate than that leading to the issuance of Regulation No. 3.

field study--of the operations of the State laws and of the State methods and standards for the issuance of age certificates.

Similarly, comparative simplicity of procedure marked the issuance of the temporary regulations, effective from October 24, 1938, to May 24, 1939, prescribing conditions for the employment of minors 14 or 15 years old in non-mining and non-manufacturing occupations. The press of time caused by the comparatively brief period between the enactment and effective dates of the Act precluded elaborate procedural steps or hearings prior to the issuance of these temporary regulations. Accordingly, the Industrial Division supplemented its own expert knowledge by consultation with the major interested groups, and through a necessarily hasty survey of the problem. The temporary regulation contained a provision permitting petitions for amendment. Immediately upon the issuance of the regulation, the Newspaper Publishers' Association petitioned for a change in the clause limiting the employment of minors of 14 and 15 to the hours between 7 a.m. and 6 p.m. Without a hearing, but simply through informal personal appearance, argument, and conference,[103] the offending clause was deleted within 10 days of the original issuance.

In contrast to these two groups of regulations, elaborate procedural machinery was utilized in connection with the issuance of permanent Regulation No. 3 and Orders No. 1 and 2. In general,

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103. Within the limitations of time, other interested groups such as the National Child Labor Committee, were consulted.

the procedure fell into four stages: (1) preliminary investigation; (2) issuance of proposed regulation; (3) hearing; and (4) issuance of the final regulation.

Preliminary steps leading to the issuance of proposed regulation: (1) Investigations and conferences. Section 421.1 of Regulation No. 5, prescribing the procedure governing determinations of hazardous occupations, provides:

> "Preparatory to the making of a finding by the Chief of the Children's Bureau that an occupation or a group of occupations is particularly hazardous. . . a study shall be made of information obtained by the Bureau or submitted to it . . . Conferences may be held with representative employers and workers in the industry, experts in industrial health and safety, and others for the purpose of discussing the nature and characteristics of the occupation . . . under consideration."[104]

Pursuant to this direction, the Industrial Division made a thorough investigation of the occupations and industry under consideration, collecting all available accident and occupational data, and material bearing on the employment of minors in the occupations and industry and on their proper definition. In addition, as is indicated by this section of the regulation, experts on safety and on child labor and representatives of employers and workers in the field under study are interviewed and conferences with interested persons are held. Thus, for example, preliminary investigation of the

104. "Limitations of staff, we are told, make it impossible for the Bureau to study more than one industry at a time for its hazards to young workers." Lumpkin, op. cit, supra, note 96, at p. 398. There is no precise formula for the selection of the industry to be studied. Study of the explosives industry was undertaken first because it presented no difficult problems and was traditionally considered extra-hazardous. Somewhat similar considerations determined the selection of the occupations of motor vehicle driver and helper. With justification, the Bureau's policy seems to be to take care of the most dangerous occupations first.

motor vehicle driver and helper occupations included a conference between four members of the Bureau and representatives of (1) the National Council of Private Motor Truck Owners; (2) American Trucking Association; (3) National Highway Users Conference; (4) Dairy Industry Committee; (5) American Farm Federal Bureau; and (6) National Cooperative Milk Producers' Federation.[105] At such conferences questions are raised upon the basis of which the Industrial Division makes further investigation. It is clear from examination of the files that such conferences are successful not only in affording interested parties an opportunity to present their views and in focusing the areas of disagreement, but what is more important (and what, at this stage, is the chief purpose of such conferences), they are helpful in informing the Bureau and in giving direction to a practical study of the field.[106]

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105. The practice of holding conferences is now being formalized, but not replaced, by the utilization of advisory committees for each of the industries under consideration. For example, such a committee, composed of 10 or 15 members, is now being created to assist in defining the mining industry and in gathering pertinent information and data. The members are selected by the Chief of the Bureau from the industry's employers, from industrial safety experts, and from labor unions.

106. It should be noted that outside investigation and conferences preceded the issuance of tentative Regulation No. 3 (dealing with 14 and 15 year old minors), although they were not so extensive as the procedure described in respect of hazardous orders. Two factors are responsible for this: (1) conferences preceded the issuance of the temporary regulation (see supra, p.163); (2) since the temporary regulation was already in effect, opportunity for study of its operation, without the necessity of new investigation, was afforded. Nevertheless, some further conferences were held.

(2) Preliminary hearing. Section 421.1 of Regulation No. 5 not only prescribes conferences and ex parte investigation of occupations which might be declared hazardous, but also provides that

> "A public hearing may be held . . . whenever such action is deemed by the Chief of the Bureau to be expedient for the purpose of obtaining . . . evidence with respect to the nature and characteristics of /the/ occupation or groups of occupations."

Under this provision, a hearing was held prior to the issuance of proposed Order No. 2, dealing with helpers and drivers of motor trucks. This preliminary hearing was omitted, however, in relation to Order No. 1.[107] The chief factors determining whether the Bureau will hold a hearing at this stage are the breadth, complexity, and controversiality of the occupations being studied. Thus, occupations in the explosives industry presented a simple problem. There were few difficulties either of definition or of conclusions concerning its hazards. On the other hand, the occupations of motor vehicle driver and helper covered a broader field, and questions of definition also arose.

It should be noted that this preliminary hearing is contemplated by the Bureau as an "investigatory" or "evidentiary" one. It is held solely as a step in the process of gathering all relevant information prior to the issuance of a proposed order or regulation. As stated by the Presiding Officer at the opening of this hearing:

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107. The provision of the regulation does not, of course, apply to Regulation No. 3 (employment of minors aged 14 and 15), nor was a preliminary hearing held.

". . . this is an informal hearing for the purpose of obtaining as much information as possible concerning the nature and characteristics of the occupation in order to assist the Industrial Division . . . in making its study . . ."

The regulation provides for "reasonable public notice of the time and place" of a hearing of this type. The notice has contained an announcement of the purpose of the hearing ["to assist the Chief of the Children's Bureau to determine . . . whether (certain named) occupations . . . are particularly hazardous"], and a "suggestion" that "the testimony presented at the hearing include information pertinent to" certain specific questions related to the occupations under consideration.[108] The notice expressly provides, however, that "This list of questions is not meant to exclude the submission of any other pertinent information which any interested party may desire to present." At the time of this first hearing, no tentative draft is announced, for the hearing is intended to assist in such drafting. Nevertheless, in order to have some concrete material before it, if not before the parties who appear, the Division had prepared a rough draft of the regulation prior to this hearing.[109]

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108. Typical questions set out in the notice include "(1) To what extent are minors under 18 employed as drivers and helpers? In what industries? (2) What different types of work are performed by helpers? (3) What are the hazards to minors in such occupations? . . . (4) Should the determination apply to all helpers . . .? (5) Should the determination define 'motor vehicle' as [definition set out]?"

109. Compare the memorandum in the files of Order No. 2: ". . . it seems desirable for the staff to have in mind a draft that is the best we have been able to arrive at to date."

Post investigation steps: (1) The Industrial Division's Report.[110] Section 421.1 of Regulation No. 5 provides that "A report of facts and conclusions with respect to the hazardous or detrimental nature of the occupation or occupations under consideration shall be prepared" upon the basis of the information and evidence collected by the Industrial Division through its surveys, conferences and hearings. Although no such report was prepared in relation to the issuance of the Regulation No. 3,[111] surveys of the occupations in question were written prior to the hearings leading to the issuance of Orders No. 1 and 2. Prepared by the Industrial Division they are extraordinarily comprehensive. The statutory authority is indicated; the methods and scope of the investigation are described;[112] analyses of accident data, of the nature of the occupation, the state legal minimum age standards are all set out; statements of persons interviewed are weighed and discussed. The report includes numbered factual conclusions (e.g.,"Work on motor vehicles involves a high degree of accident risk . . Workmen's

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110. Since, in general, the conduct of the hearing, the questions of the process of proof, and the like, are similar for both the first and second type of hearing, description is reserved for a subsequent point (p. 172 ff.).

111. See supra, footnote 106.

112. It is through this report that the evidence adduced at the preliminary hearing is perpetuated and utilized for the subsequent stages.

compensation experience shows . . . The opinion of experts is . . ."). [113]

(2) Formulation of tentative draft. Section 421.2 provides that "A proposed finding and order shall be prepared upon the basis of the report of facts and conclusions with respect to a particular occupation or group of occupations." [114] Although as already noted, this regulation applies only to the determination of hazardous occupations, a proposed regulation, based on the Industrial Division's study, was also formulated prior to the hearing leading to the issuance of Regulation No. 3. These proposals are drafted in conferences among the staff of the Industrial Division and by its attorney; they are subject to the approval of the Chief of the Children's Bureau, the Department's Solicitor, and the Secretary of Labor. They are signed by the Chief of the Bureau.

Each of the proposed drafts sets out the projected regulation itself; in addition, in relation to Orders No. 1 and 2, the proposed findings, which are in fact the conclusions as set out in the Industrial Division's report, were included.

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113. For the subsequent use of this report, see infra, p. 171 and p. 173.

114. After the first hearing and before the preparation of the proposed findings, further conferences with interested or informed persons may be held.

Hearings: (1) In general. The Act is ambiguous concerning the necessity of hearings prior to the issuance of this group of regulations. As described above, as to hazardous occupations, the Act provides that the Chief of the Bureau "shall find and by order declare" occupations to be hazardous; on the other hand, employment in non-mining and non-manufacturing industries of minors between 14 and 16 is permissible "if and to the extent that the Chief of the Bureau" so "determines." It is impossible to say whether any distinction with respect to the requirement of hearings is necessitated by the words "find and declare" and "determine"; in any event, despite its position that the statute does not so require, the Bureau has held hearings prior to the issuance of Regulation No. 3 as well as of Orders Nos. 1 and 2. In relation to hazardous occupations, this policy has been crystallized by Section 421.2 of Regulation No. 5, which provides that "Before a proposed finding and order is made final, reasonable notice and opportunity to be heard shall be afforded to interested parties . . ." Accordingly, hearings have been held prior to the issuance of Orders Nos. 1 and 2, as well as of Regulation No. 3.

(2) Notice. Prior to each of these three hearings, notice has been published in the Federal Register and through general press release. In addition, notice is sent by regular and air mail to all possibly interested parties. How thorough and conscientious an attempt is made by the Division to apprise the persons who might be affected by the regulation is indicated by the files of Order No. 1, which dealt with the manufacture of explosives. Notices were mailed

to all members of the advisory committee on occupations hazardous to minors; other individuals and agencies on the general mailing list; all known manufacturers of explosives, safety experts, and other individuals in explosives manufacturing concerns; labor organizations in the explosives field; trade associations and trade publications in the field; and other agencies and individuals with special interest in explosives. The general mailing list addressees included State labor commissioners, employment certificate issuing officials, American trade union journals, State and local trade associations, and national trade associations. Finally, copies of the press release were distributed to all press associations, the major metropolitan dailies, and selected Italian and other newspapers in localities where unidentified fireworks factories were understood to be located.

The content of the notice is as complete as its distribution. Beside setting out the time and place of the hearing, the notice contains the statutory authority, the prior procedural steps, the entire proposed regulation or findings and order, and, in the case of Orders Nos. 1 and 2, the conclusions of the Industrial Division report. Express announcement is also made in the notice of the existence and availability of the report, and copies of the report are mailed to known interested parties.

(3) Time and place of the hearing. Each of the three basic hearings, as well as the preliminary hearing, has been held in the Department of Labor in Washington, D. C. Fourteen days elapsed between the notice and preliminary hearing, and 29 between the notice

and second hearing, leading to the issuance of Order No. 2; 12 days as to Order No. 1; and 15 as to Regulation No. 3.

(4) Conduct of the hearing; parties; evidence. Of the four hearings thus far held, the Chief of the Bureau herself has presided in three;[115] in the fourth (the hearing following the preliminary hearing held in connection with Order No. 2), the Bureau's attorney presided.[116]

The hearings are conducted in a manner similar to legislative hearings; the adversary characteristics which mark some of the proceedings held by the Wage and Hour Division have thus far been happily absent.[117] Witnesses are not sworn, nor is there examination or cross-examination of witnesses by counsel or by other witnesses. Questions may be suggested to the presiding officer by persons present; if she "considers such questions appropriate and material," she will ask them. This rule, sensibly adopted to avoid the danger of protracted contentiousness, has given the parties little difficulty. In only one of the four hearings was a question put by one of the parties and it was promptly asked by the presiding officer.

The hearings are opened by a statement of the presiding officer concerning its purpose and the prior proceedings; representatives of the Industrial Division of the Bureau are heard next, followed by employers and trade associations, unions, and representatives of the public in that order. All "interested parties" are entitled to

115. At one time the Bureau considered obtaining an outside person to preside at the hearing; it was decided that since the Chief of the Bureau was available to preside, this step was unnecessary.

116. In each case, the presiding officer was assisted by staff members who also sat at the hearing.

117. All hearings, including the preliminary hearings, are stenographically reported and transcribed (secs.421.1, 422.2 of Regulation No.5). Copies are available for inspection at the Bureau's offices and may also be purchased.

participate, but the adjective is in no sense a limitation, since the Bureau has regarded any one who wishes to testify as "interested." Although parties are expressly announced to be entitled to counsel, they do not ordinarily utilize legal services. In the one case where counsel for a group of parties appeared, he participated as a witness to present facts. Accordingly, the question and answer method of adducing testimony is absent; rather each person is permitted to read his statement with little interruption. The presiding officer, or her assistants sitting with her, may occasionally ask questions, but solely "for the purpose of developing or clarifying facts which she deems material." This questioning is not in any sense cross-examination or in defense of any particular position; often it is simply a request for the witness' opinion concerning some point at issue.

The Bureau has not sought to apply any rules of evidence at all, but "only material evidence is considered." The only occasion upon which there was anything resembling a ruling occurred at a hearing when a witness talked at great length and with utter irrelevance. The presiding officer interrupted with the remark that, "I don't want to hurry you . . . but could you express your views as to the proposed regulation before us?" In none of the four hearings was an objection made.

As a result, much that is hearsay of varying degrees of remoteness and much that is argumentative is permitted. The Industrial Division's report, containing statements of persons interviewed, quotations from books on child labor, and the like, is made a part of the record. Detailed description or identification of surveys and

methods utilized is omitted. In contrast to the requirement invoked in wage order hearings, the Bureau does not insist that the witness who presents data or other material must either have prepared them himself or must have knowledge of their truth. In fact, in one case, a witness presented statistics given to him by a third person; he frankly disclaimed any knowledge of their accuracy, and offered them without objection for what they were worth.

Nor is there any limitation on the acceptance of ex parte statements or other material submitted by persons not present. Section 421.2 of Regulation No. 5 expressly gives to the interested persons the right not only to be heard, but also to "submit documentary evidence." Such material, accordingly, bulks comparatively large in the record. Of the total of 206 pages devoted to the hearing leading to the issuance of Regulation No. 3, 66 pages were devoted to ex parte statements, letters, and communications sent in before or during the hearing. It is also common to permit post-hearing material to be submitted for the record. For example, in the hearing on Regulation No. 3, all the factual material presented by the American Newspaper Publishers' Association - the group probably most affected by the proposed regulation - was, by arrangement at the hearing, allowed to be submitted within two weeks after the close of the hearing. Because of the importance of this post-hearing data, copies were distributed to interested parties in so far as possible; additional copies were made available for inspection at the Bureau's offices. Two weeks were permitted for rebuttal material. It is to be noted, however, that this practice has not been formalized; attempt is not made in all

cases affirmatively to apprise parties of post-hearing material and to afford opportunity for rebuttal.[118]

Post-hearing procedure. In all cases, interested persons, whether or not they appeared, may file briefs. From one to three weeks for filing are permitted, and an additional one to two weeks are allowed for reply briefs. Their form, number or content have not been prescribed. Since in fact much of the hearing proceedings is devoted to "testimony" in the nature of oral argument, and since in three of the four hearings the Chief of the Bureau presided, there is justifiably no provision for further argument. For similar reasons and, too, because the proposed regulation and the Industrial Division's report serve to focus the issues which at best are not complex,[119] no intermediate report has been issued.[120]

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118. Unless it would unreasonably delay ultimate determination, it may be advisable for the Bureau to insist in all cases that persons who submit post-hearing material make sufficient copies to send to each of the other parties appearing at the hearing, and to permit rebuttal material.

119. As is described below, pp. 178-179, in any event if any substantial change is made in the proposed regulation, a new hearing would be held. Effective prognosis of the Bureau's position is thus afforded.

120. In the fourth hearing, the designation of the Bureau's attorney as Presiding Officer included a provision that he was to submit to the Chief of the Bureau "a report of the hearing together with the transcript . . ." Both the Presiding Officer and one of his assistants submitted single-paged memoranda briefly describing the events at the hearing and concluding with a recommendation that the proposed finding and order be made final without modification. Since the "hearing", as discussed below, consisted of a 71 word statement of a witness who supported the proposed order a more elaborate report was unnecessary, and no good purpose would have been served by submitting it to outsiders. Where the Bureau was considering using an outside trial examiner (supra, footnote 115), preparation by him of an intermediate report, which was to be made public and upon which exceptions and oral argument was to be permitted, was contemplated. This project was fortunately abandoned.

Thereafter, the record and all other material submitted is studied by the staff. In all cases, the Chief of the Bureau has read the entire record. It may also be noted that in sharp and, under the circumstances, sensible contrast to the practice utilized by the Wage and Hour Division in wage order hearings, there is no attempt at separation of functions either at this or at any other stage of the proceedings. From the beginning, each step leading to the regulation or order is a product of the joint efforts of the staff. The same persons who investigated and drafted the Industrial Division's report participate in the drafting of the proposed regulation, the conduct of the hearing, and the preparation of the final regulation. The size of the staff would make any other arrangement impossible even were it assumed that separation in a process of this nature might be desirable.

Consideration of extra-record material. Section 421.4 provides that "A finding and order shall be made by the Chief of the Bureau upon the basis of all the information and evidence in the case, including the report of facts and conclusions . . . and the evidence and briefs received" (underscoring supplied). This provision would seem clearly to permit the Bureau to go beyond the confines of the hearing record in formulating its ultimate regulation. As already noted, however, the Industrial Division's report embodying the results of its ex parte investigation is submitted to interested parties and made a part of the record at the hearing. In addition, the Bureau has restricted itself to the record in drafting the final regulation, and has, in addition, insisted that the findings and other phases of the regulation be "supported by evidence in the record."

Since as a rule all the Bureau's knowledge and data are likely to be incorporated into its comprehensive report which becomes "evidence" on being submitted into the record, this strict view adopted by the Bureau will not ordinarily cause it any serious difficulties; yet, the embarrassment which may be engendered by its application is indicated by Regulation No. 3, governing the conditions under which children between 14 and 16 could be employed. One of the limitations to be set out in the regulation was the total number of hours per week during which such minors could be employed when school is not in session. At the hearing, one group advocated a low total number of hours; another a total considerably higher; the Industrial Division, at the hearing, supported a median. The staff of the Children's Bureau, in studying the record and preparing the final order, believed that a figure somewhere between the two was proper. Since, as a matter of fact, the median had been advocated, the Bureau felt that it could select that figure because it had support in the record; it is doubtful whether, were it not for the testimony of the Industrial Division, the Bureau would have felt free to make this choice.

Aside from the question of whether in fact the middle figure was supported by the record, it is submitted that rigid inflexibility of this type may defeat the very purposes for which administrative agencies are created. Unless clearly required by the statute - and no such requirement appears here - an agency engaged in rule-making should not leave itself at the mercy of the proposals and opinions of outside persons often uninformed and usually activated by some particular

interest. The incidence of the Bureau's expertness on its procedure is discussed more fully below; but it may be noted here that surely a group of persons probably more familiar with the problems of child labor than any in the country should not behave as though they knew nothing except what was told them in the hearing. Expert knowledge may be a luxury forbidden to juries, but it is an essential necessity to an agency engaged in rule-making. And even if jury concepts were applicable, support could be found for the proposition that decision was not limited to a choice of one of the several expressions of opinion at the hearing.

The final proposed regulation. After the regulation or order is redrafted in the light of the hearing and approved by the Solicitor of the Department, still another step is necessary before its final adoption. The post-hearing draft is made public, and published in the Federal Register. The notice announces that "objections will be received for a period of 10 [or 15] days following publication . . . after which time the proposed regulation will be issued as a permanent regulation . . . unless, in the opinion of the Chief of the Children's Bureau, objections thereto disclose just cause for further revision thereof." In only one of the three regulations or orders thus far issued after hearing have there been objections at all. In that case, two parties objected, one on the ground that the regulation was too severe, the other on the ground that it was too lenient. The objections were considered by the Bureau's attorney, and since they raised no new issues at all, but reiterated the positions which the objections had taken and had thoroughly discussed at the hearing, no further action was taken. It is stated that in the event that the objection "discloses just cause for further revision" by raising new issues or throwing new

light on the subject, a full new hearing will be held.[121]

Publication: the form of the regulation. Section 421.4 of Regulation No. 5 requires that "Every . . . finding and order shall be published . . . in the Federal Register and by such other means as the Chief of the Bureau deems reasonably calculated to give interested parties general notice of the making of such order." Similarly, Regulation No. 3 was published in the Federal Register. Each of the regulations and orders is given the same wide circulation as the original notice of hearing.

Since it marks a departure from the customary bare bones of the regulations ordinarily issued, the form of the Bureau's orders and regulations may be noted. The regulations relating to hazardous occupations are divided into two sections: The first, the "finding of fact," sets out the prior procedure and the conclusions of the Industrial Division's report, and concludes with a finding that the occupation is a hazardous one. The second part of the regulation is in the form of an order, declaring such occupations to be hazardous,

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121. In addition, section 421.3 of Regulation No. 5 provides:

> "If, after [the] hearing [following the issuance of the original proposed finding and order], a substantial change in the proposed finding and order is in the judgment of the Chief of the Bureau required, a rehearing shall be held with respect to the proposed finding and order as so changed. Every such rehearing shall be conducted in the manner prescribed for [the preceding] hearing. . ."

In terms, this section requires a rehearing whether or not objections are made if "a substantial change" occurs. This has not yet occurred and in the light of the care which marks the proceedings, is unlikely to occur. Nevertheless, to avoid further delay where no one requests it, it is submitted that this section be reworded so as to necessitate a rehearing only if (1) a substantial change is made in the proposal, and (2) objections are made which raise new and important issues upon which there was no opportunity or cause to adduce evidence at the original hearing. A rehearing in the absence of objections would thus be precluded.

and defining the industry. Regulation No. 3, dealing with the employment of minors between 14 and 16, is similarly divided into two parts, the "Determination", and the "Regulation." The former is similar to the "finding of fact" of Orders Nos. 1 and 2; the regulation proper follows. In so far as these recitals, indicating as they do the many steps and careful consideration which preceded the regulation, may generate confidence among those regulated, who must thereby be convinced that this was no arbitrary administrative fiat plucked out of thin air, this form of regulation may be a useful device.

Effective date of regulations; amendment. Section 421.4 of Regulation No. 5 provides that findings and orders "shall become effective when made and published in the Federal Register. . ." In fact, each of the three regulations here discussed have been assigned a future date to permit adjustment. Order No. 1 was issued on May 18, 1939; its effective date was July 1, 1939; Order No. 2 was issued November 27, 1939, became effective on January 1, 1940; the dates for Regulation No. 3 were May 8, 1939 and May 24, 1939, respectively.

Since the orders apply to particular industries, and follow careful and extended consultation with and hearing of interested persons, no provision for amendment is made therein, although, of course, if cause or need should appear, the orders could be revised. Regulations No. 3 and 5, as well as the temporary regulations governing the employment of minors aged 14 and 15, contain sections permitting interested persons to petition for amendment. If the petition shows "reasonable cause", a hearing may be scheduled or other provision for "affording interested parties an opportunity to be heard" will be made.

Only one such petition has been received, and this was to amend temporary Regulation No. 3 (supra, p.163).

Comments on the Bureau's rule-making procedure. Viewing each one of the steps separately, and with the minor exceptions noted above in passing, one can have no quarrel with the procedures utilized by the Children's Bureau in exercising its rule-making power. Its extraordinary care, conscientiousness and respect for detail are admirable. Similarly praiseworthy is its sensible method of conducting hearings without the strait-jackets and restrictions of an adversary procedure, but with an unencumbered opportunity for all possibly interested persons to speak their pieces and inform the Bureau.

Yet serious reservations must be voiced concerning the procedure as a whole - a procedure which has been described as a "long-drawn-out process" whose result is to make "the prospect of early determination of hazardous employments discouraging."[122] The consumption of time is, of course, a factor which may properly be used in evaluating the procedure; on this score, the process is somewhat less than satisfactory.[123]

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122. Lumpkin, op. cit. supra, note 96, p. 398.

123. The time consumed by each of the steps is indicated by the following schedule: (1) Order No. 1 (explosives): Study was begun soon after the passage of the Act on October 24, 1938. Notice of hearing: March 10, 1939. Hearing: March 28, 1939. Final proposed regulation issued: May 2, 1939. Final adoption and issuance: May 18, 1939. Effective date: July 1, 1939. (2) Order No. 2 (motor vehicles): Study begun in the Spring of 1939. Notice of preliminary hearing: August 4, 1939. Hearing: August 18, 1939. Report of investigation: October 6. Notice of second hearing: October 10, 1939. Second hearing: October 27, 1939. Final proposed regulation issued: November 8, 1939. Final adoption and issuance: November 27, 1939. Effective date: January 1, 1940. (3) Regulation No. 3: Temporary regulation issued (Continued)

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But lapse of time is unimportant where there is compensating utility. In so far as objective and quantitative tests of utility can be made, one's conclusion must still be in the negative. Twenty-two appearances were filed and twenty-one statements by witnesses, covering less than 140 pages of transcript, were made at the hearing leading to Regulation No. 3. Despite the elaborate and thorough attempt to give notice to all possibly affected persons, at the explosives hearing there were three witnesses, whose "testimony" covered 16 pages of transcript. At the preliminary hearing on motor vehicles, one witness appeared; 11 pages of transcript were devoted to his statement. At the second motor vehicle hearing, one witness appeared; his statement was 71 words.

Examination of the "testimony" presented at the several hearings provides convincing evidence of the lack of qualitative utility of these elaborate proceedings. In the four hearings, it is difficult to find any really relevant factual evidence which might have served to inform the Children's Bureau of the problems before it.[124]

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123 (continued)
and study begun: October 24, 1938. Notice of hearing: January 31, 1939. Hearing: February 15, 1939. Final proposed regulation issued: April 25, 1939. Final adoption and issuance: May 8, 1939. Effective date: May 24, 1939.

At least as far as Orders Nos. 1 and 2 were concerned, the issues were simple, since as described above (footnote 104), the easiest industries were chosen. It may be expected that as more complex and controversial fields are undertaken, and with the utilization of advisory committees, the time consumption will be considerably increased. It should also be recalled that these orders in content are extremely brief and simple: the substance is simply a declaration that certain occupations are hazardous, and a short definition of the occupation.

124. A possible exception may have been the hearing on Regulation No. 3, where physicians and school authorities made statements. Even these, however, were chiefly statements of the obvious, being opinions and conclusions no longer much controverted.

As described above, the testimony is little more than argument; the only testimony in the second motor vehicle hearing was a 71 word statement approving the proposal. The presiding officer in the latter hearing put three questions seeking to elicit factual information from the witness; the latter could answer none. If these hearings are – as they should be – a step taken by the Bureau properly to inform itself of conditions in the industry and of the possible effects of the proposed regulation, the hearings thus far held may fairly be characterized as useless.

Fair play in rule-making procedure of this nature would seem to require careful investigation and analysis, and an opportunity for all persons to make known their views. It is improbable that fair play can be interpreted to require formal steps which are useless; certainly it cannot be contended that it requires three – or more – hearings prior to the issuance of a regulation.[125]

Nor should there be cause for surprise that the elaborate procedure utilized by the Bureau has turned up little that is useful to the formulation of a sensible, sound, and satisfactory regulation. Thorough utilization of the investigatory and conference method, resulting in the able and comprehensive reports described above, coupled with the expert knowledge of the Bureau gained through its

125. The hazardous determination contemplates the possibility of an infinite number of hearings. The first is the preliminary hearing preceding the proposed order; the second is on the proposed order. If the second was a useful hearing throwing new light on the problem so as substantially to change the proposed order, a third hearing must be held. If this third hearing causes substantial changes, a fourth hearing is in order – and so on until the hearing is one in which nothing important is presented. Then the process may stop.

intimate contact with the problems of child labor,[126] seem to make hearings as a matter of course unnecessary superimpositions. Indeed, it may fairly be guessed that comparatively few employees, and far fewer employers, are covered by the regulations;[127] the thorough canvassing of opinion involved in the extensive conferences held by the Bureau should be effective in learning all possible views. Of the few changes made in the proposed regulations and orders following hearings, it is difficult to find any which might not have been achieved through a less formal method of exchanging opinions.

A spokesman of the Bureau frankly admits the inutility of the hearing method; conferences have proved to be far more helpful. But he suggests that providing persons with an opportunity to "air their views" in public hearings is useful in its "persuasive effect" upon those to whom the regulations apply. As already indicated, however, thus far prospective regulatees have indicated little desire to air their views at all.

Hearings, of course, may under some circumstances be found by the Bureau to be helpful, but it is submitted that the Bureau should not obligate itself - as it has through Regulation No. 5 - to hold one or more hearings come what may. It would seem to be preferable for the Bureau to proceed with its special investigations and conferences,

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126. "Behind [the Bureau is] the valuable experience of administering the 1916 law, the principal features of which were similar to the 1938 Act. Also its staff of experts were able to draw upon their first-hand knowledge of new practices as these had developed in the several states during the past twenty years." Lumpkin, op. cit. supra, note 96, p. 393.

127. See supra, note 93.

to issue a proposed regulation thereon, to distribute its report and proposal with an announcement that comments and suggestions would be welcome, to permit further conferences on the report and proposal, and then hold hearings if, and only if, the responses indicate (1) that there have been factual gaps in the report; or (2) that there are important disagreements either upon the facts or upon the feasibility of the proposal - disagreements which cannot be properly set forth to the Bureau in written form and disagreements which are not of the type which have already been presented to the Bureau in conferences and interviews and which have been already resolved by the Bureau. In brief, the hearing process should be reserved for those occasions where the Bureau feels it would be useful either in obtaining facts or in guiding its judgment, after investigation and conference have failed, or perhaps also in cases where the heat of disagreement (if any exists) may be cooled by public presentation of the dissentient opinions.